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No. 85

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

TEAMSTERS LOCAL 317,

*Petitioner,*

*-v-*

CLINTON'S DITCH COOPERATIVE CO., INC. and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. What is the proper standard for determination of joint employer status under the National Labor Relations Act?

2. Whether the Court of Appeals erred in finding a waiver of the right to bargain by Teamsters Local 317?

3. Whether the Court of Appeals misapprehended or misapplied the substantial evidence standard in vacating the National Labor Relations Board's decision that Clinton's Ditch Cooperative Co., Inc. was a joint employer of drivers represented by Teamsters Local 317?

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

The Board's Findings ..... 3

Clinton's Ditch's and Fairfield's Employment of the Teamsters Drivers ..... 3

Termination of Fairfield and the Appearance of Global ..... 7

Proceedings Before the Board and Court of Appeals ..... 9

REASONS FOR GRANTING THE WRIT

I. THE PROPER STANDARD APPLICABLE TO DETERMINATION OF JOINT EMPLOYER STATUS IS AN IMPORTANT ISSUE OF FEDERAL LABOR LAW THAT SHOULD BE ADDRESSED BY THIS COURT ..... 11

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE CLEAR AND UNMISTAKABLE WAIVER STANDARD AND THE ENFORCEABILITY OF ORAL AGREEMENTS UNDER THE ACT ..... 16

III. THE COURT OF APPEALS MISAPPLIED THE SUBSTANTIAL EVIDENCE STANDARD AND FAILED TO TAKE ACCOUNT OF RECORD EVIDENCE SUPPORTING THE BOARD'S JOINT EMPLOYER FINDING ..... 20

CONCLUSION ..... 26

# APPENDIX

Page

Court of Appeals Order dated January 24, 1986, denying Petition for rehearing ..... A-1

Court of Appeals Opinion dated December 5, 1985 A-3

National Labor Relations Board Decision and Order dated February 28, 1985 ..... A-21

Administrative Law Judge's Decision and Order dated January 5, 1983 ..... A-30

29 U.S.C. §157 ..... A-69

29 U.S.C. §158 ..... A-69, A-70

29 U.S.C. §160(e) ..... A-73

Agreement between Clinton's Ditch Coop. Co., Inc. and Global Leasing dated October 29, 1980 . A-76

Letter from Global Leasing to Clinton's Ditch Coop. Co., Inc. dated August 28, 1980 ..... A-84

# TABLE OF AUTHORITIES

CASES Page(s)

*Allbritton Communications Co. v. NLRB*, 766 F.2d 812 (3rd Cir. 1985), *cert denied*, 106 S. Ct. 850 (1986) ..... 25

*Anderson v. City of Bessemer City*, 105 S. Ct. 1504 ..... 21

*Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)..... 25

*Brooks v. NLRB*, 348 U.S. 96 (1954) ..... 12

*Carpenters Local 1846 v. Pratt Farnsworth*, 690 F.2d 489 (5th Cir. 1982) ..... 13

*Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985) ..... 11

*Consolidated Edison Company v. NLRB*, 305 U.S. 197 (1938)..... 20

*Conway's Express v. NLRB*, 195 F.2d 906 (2d Cir. 1952) ..... 18

*H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941)..... 18

*Industrial Personnel Corp. v. NLRB*, 657 F.2d 226 (8th Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) ..... 14

*International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977) ..... 12

*International House v. NLRB*, 676 F.2d 906 (2d Cir. 1982) ..... 14

*International Union, United Automobile Workers v. Scofield*, 328 U.S. 205 (1965) ..... 12

*Liquid Carbonic Corporation*, 277 NLRB No. 91 (1985) ..... 14

*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) ..... 16

*NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982) ..... 11

*NLRB v. Financial Institution Employees of America, Local 1182*, 106 S. Ct. 1007 (1986) ..... 19

*NLRB v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966) ..... 25

*NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270 (4th Cir. 1970) ..... 11

*NLRB v. Lumber & Mill Employers*, 736 F.2d 507 (9th Cir.), *cert. denied*, 105 S. Ct. 333 (1984) ...21

*NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960) ..... 24

*NLRB v. Plumbers Local 638*, 429 U.S. 507 (1977) ..... 22

*NLRB v. Walton Mfg. Co.*, 368 U.S. 404 (1962) ... 25

*NLRB v. Pacific Intercom Co.*, 679 F.2d 900 (9th Cir. 1982), *enforcing* 255 NLRB 184 (1981) ... 18

*Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275 (8th Cir.), *cert. denied*, 449 U.S. 875 (1980)... 12

*Ref-Chem Company v. NLRB*, 418 F.2d 127 (5th Cir. 1969) ..... 11

*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) ..... 21

*Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982) ..... 16

*Sun Maid Growers v. NLRB*, 618 F.2d 56 (9th Cir. 1980) ..... 12

*Ted Hicks and Associates, Inc. v. NLRB*, 572 F.2d 1024 (5th Cir. 1978) ..... 18

*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) ..... 20

STATUTES AND RULES:

National Labor Relations Act

29 U.S.C. §141 *et seq.* ..... passim

29 U.S.C. §152 ..... 24

29 U.S.C. §158 ..... 4, 9, 11

29 U.S.C. §160 ..... 12

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85

TEAMSTERS LOCAL 317,

*Petitioner,*

-v-

CLINTON'S DITCH COOPERATIVE CO., INC.
and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Teamsters Local 317 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit [A-3], the decision of the National Labor Relations Board [A-21], and the decision of the Administrative Law Judge [A-30], appear in the Appendix. The Administrative Law Judge found that respondent Clinton's Ditch Cooperative

Co., Inc. ["Clinton's Ditch"] was a joint employer that committed an unfair labor practice by failing to bargain with Teamsters Local 317 ["Local 317 or the "Union"] over its decision to subcontract its trucking operations. The National Labor Relations Board ["NLRB" or the "Board"] agreed, affirming the Administrative Law Judge's rulings, findings and conclusions and adopting the recommended order. The Court of Appeals, concluding that there was insufficient evidence to support the Board's determination, vacated the decision and denied enforcement.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1985. Thereafter, a timely petition for rehearing, with a suggestion for rehearing en banc, was denied by the Court of Appeals on January 24, 1986 [A-1]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 7, 8(a)(1) and (5), 8(d), and 10(e) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(1) and (5), 158(d), and 160(e) are reprinted at A-69 to A-75 of the Appendix to this petition.

## STATEMENT OF THE CASE

Clinton's Ditch employed drivers represented under collective bargaining agreements with Teamsters Local 317 to haul its soft drink products throughout New York State and into New England. In 1976, Clinton's Ditch moved the drivers

to the payroll of a "contract trucker", Fairfield, under express assurances to Local 317 and the drivers that only the name on the paycheck would change and that if the Fairfield arrangement terminated, the drivers would continue their work under Local 317 contract. Thereafter, Clinton's Ditch continued to control the terms of the labor agreement with Local 317 and the day-to-day workings of the drivers.

In 1980, Clinton's Ditch terminated the Fairfield arrangement and entered into a similar arrangement with Global, another contract trucker, who had promised a cheaper labor agreement with a Chicago union. The Local 317 drivers were terminated and Clinton's Ditch refused to bargain with the Union or honor its previous agreement to rehire the drivers. A new group of drivers was hired, under the name of Global but under the day-to-day control of Clinton's Ditch.

The Union filed charges with the Board. The Administrative Law Judge, finding Clinton's Ditch and Fairfield to be joint employers, issued a determination that Clinton's Ditch had violated Section 8(a)(1) and (5) of the Act. The Board agreed and affirmed the decision. The Second Circuit, finding insufficient evidence of joint employer status and that Local 317 had failed to preserve its bargaining rights, vacated the Board's determination.

## THE BOARD'S FINDINGS

### Clinton's Ditch's and Fairfield's Employment of The Teamsters Drivers

Clinton's Ditch bottles and cans soft drinks for its members, New York State Pepsi-Cola bottlers. Until 1976, delivery of product to customers was accomplished by truck drivers on

the Clinton's Ditch payroll. These drivers, represented by the Local 317, drove equipment that Clinton's Ditch leased from Ryder Trucks. Tractors bore the Clinton's Ditch logo; trailers carried the Pepsi-Cola logo. Clinton's Ditch and Local 317 had successive labor agreements from at least 1970 to February, 1978, covering a regular complement of some 15 drivers[A-32 to 33].

In or around December, 1975, Clinton's Ditch informed Local 317 that it was switching leasing companies, and that Fairfield Trucking ["Fairfield"] would take over the trucks and, eventually, the dispatching. During discussions Clinton's Ditch committed to Local 317 that (1) nothing would ever change, (2) it would continue following the labor agreement, (3) it would retain the right of approval of any collective bargaining agreement between Fairfield and Local 317, and (4) if the arrangement with Fairfield did not work out, it would simply buy the trucks back and operate as before, with the drivers continuing to work for Clinton's Ditch[A-35].

In January, 1976, Fairfield bought the Clinton's Ditch trucks from Ryder and took over responsibility for their maintenance. Fairfield utilized the same garage that Ryder had used, on Clinton's Ditch property, for payment of a dollar a year. Clinton's Ditch's traffic supervisor, Robert Venette, continued as before to assign the drivers their runs. The drivers' uniforms, some branded with the Clinton's Ditch logo, remained the same.

In May, 1976, Clinton's Ditch and Fairfield agreed in writing that Clinton's Ditch would provide the maintenance building for the use of Fairfield and, on termination of their arrangement, that Clinton's Ditch would repurchase the vehicles and equipment from Fairfield. They also agreed:

> [Fairfield] agrees to assume all obligations of [Clinton's Ditch] under its present collective bargaining agreement dated March 3, 1975 (effective February 2, 1975) with Local 317, International Brotherhood of Teamsters, and to secure the release of [Clinton's Ditch] from any further obligations thereunder.

Such a release, however, was never obtained. The agreement between Clinton's Ditch and Fairfield could be terminated by either party upon 90 days' written notice[A-36].

Local 317 continued to look to Clinton's Ditch as the employer. In August, 1976, Local 317 raised a grievance with Clinton's Ditch complaining of new workload responsibilities for drivers added after Fairfield took over the trucks.

In September, 1976, Clinton's Ditch moved to change the drivers to the Fairfield payroll. The drivers and Local 317 received a letter indicating that, effective September 20, 1976, Clinton's Ditch would transfer its trucking over to Fairfield. On September 9, 1976, the Union was notified in writing that beginning September 20, 1976, "the agreement with Fairfield will be implemented. . .", and requesting "that the Union acknowledge that they will then look to Fairfield as the employer." The September 9 letter further stated that "a formal agreement between the Co-op, Fairfield and Local 317, whereby Fairfield assumes the obligation of the Union contract and Local 317 agrees to look to Fairfield as the employer, can be entered into"[A-7].

Local 317 was not agreeable to these plans and, by letter of September 13, 1976, preserved its rights by refusing to agree that Fairfield would be considered the drivers' employer. Local 317 also reminded Clinton's Ditch that Clinton's Ditch had previously assured the Union that nothing would change when Fairfield took over, and that in the event the Clinton's Ditch/Fairfield arrangement was terminated, present employees would be rehired under Local 317 contract by Clinton's Ditch or another contract trucker. Clinton's Ditch did not respond to Local 317's letter or dispute any of the points raised therein. Local 317 never agreed to relieve Clinton's Ditch from its collective bargaining obligations. Although advised by its attorneys to obtain a waiver agreement from Local 317, Clinton's Ditch never did so[A-36].

On September 20, 1976, Clinton's Ditch transferred its drivers to the Fairfield payroll, with no diminution in seniority or benefits. The drivers were not compelled to fill out new employment applications, nor was there a hiatus in operations. They operated the same vehicles with the same logos as before. The drivers continued to work out of the Clinton's Ditch garage and followed the same process of obtaining their "trip", truck number and starting time.

Consistent with the agreement reached with the Union in December, 1975, Clinton's Ditch representatives told drivers that nothing would change except the name on the paycheck. Drivers were assured that the operation would be the same and that they would always have a job there. Local 317 subsequently negotiated a successor collective bargaining agreement, effective February 2, 1978 to February 1, 1981, with a Fairfield representative who was directed behind the scenes by Clinton's Ditch as to the terms of the agreement[A-46, A-60].

**Termination of Fairfield and the Appearance of Global.**

Clinton's Ditch was concerned with the high labor costs for trucking of its product. In the summer of 1980, Clinton's Ditch solicited bids to replace Fairfield. On August 25, 1980, Clinton's Ditch General Manager Woodruff met with Jack Bevan, president of Global Leasing ["Global"], and discussed a Global takeover of the driving. On August 26, 1980, Bevan wrote to Woodruff and confirmed their discussions of the previous day:

> We would screen and test drivers and offer employees to you who meet all State and Federal requirements. They would be *considered our employees but would be under your exclusive control and direction, just as if they were directly employed by you* . . .
>
> As I told you in my conversation while in Syracuse, I recommend that these drivers be put under a union contract with the Brotherhood of Railway & Airline Clerks. I believe that Local 317 will do all in their power to organize this operation as they will be losing this membership. Any rates that I am quoting you I am sure that I will be able to negotiate with BRAC . . . . [A-84 to A-85, emphasis supplied].

Woodruff did not mention to the drivers or Union that he was actively seeking to replace them and avoid Local 317. By early October, Woodruff knew that Fairfield would be terminated. Between October 1 and October 14, 1980, Woodruff instructed Bevan to obtain drivers to perform the trucking, which would commence November 1. True to his word, Bevan obtained a labor agreement in short order

(November 5, 1980) with the "National Production Workers Union of Chicago and Vicinity, Local 707" that tracked the "Plan II" scheme of wages Bevan quoted Woodruff in his August 26, 1980 letter[A-86].

After Woodruff directed Bevan to obtain the drivers, Local 317 received a notice from Fairfield that its hauling contract with Clinton's Ditch would terminate October 31 and "all bargaining unit employees will be permanently laid off". Local 317 Business Agent Hall contacted Durkin (of Fairfield) and then Woodruff; both refused to discuss the matter. In the meantime, on October 19, 1980, a Global advertisement for tractor-trailer drivers appeared in a Syracuse newspaper. Some of the Local 317 drivers applied for the jobs but none were hired[A-54].

On October 30, 1980, the Union advised Woodruff by telegram:

> Teamsters Local 317 has been advised that it is your intention to terminate your relationship with Fairfield Transportation Corporation whereby that company has been utilized to meet the trucking needs of Clinton Ditch Co-op Company Incorporated. As you know, this work was performed until 1976 by employees of your company under a collective bargaining agreement with this Local. At that time your company agreed with this Local that any trucking in the future would be done under a Local 317 agreement and that the contract trucker or Clintons Ditch would utilize the same drivers as had done this work originaily for Clintons Ditch and later under the Fairfield agreement.

> We demand to meet with you to discuss this situation. It is this Local's position that your company may not now unilaterally arrange for that work to be performed by another contract trucker that does not have a contract with this Local and who does not employ the Fairfield (formerly Clinton Ditch) drivers. Please contact the undersigned immediately to arrange for such a meeting[A-10].

Clinton's Ditch did not reply.

## PROCEEDINGS BEFORE THE BOARD AND COURT OF APPEALS

Upon the filing of a charge by Local 317 on November 5, 1980, the general counsel for the National Labor Relations Board issued a complaint alleging, *inter alia*, that Clinton's Ditch had unlawfully subcontracted its trucking operations to Global in violation of §8(a)(1) and (5) of the National Labor Relations Act. 29 U.S.C. §158(a)(1) and (5). Following nine days of hearings in early 1982, Administrative Law Judge Martin Linsky issued a decision finding that Clinton's Ditch was a joint employer of the drivers along with Fairfield; that Clinton's Ditch's decision to contract the work out to Global was a mandatory subject of bargaining; and that Local 317 had not waived its bargaining rights. The ALJ therefore concluded that Clinton's Ditch had violated the Act by failing to bargain with the Union. The ALJ recommended an order requiring Clinton's Ditch to cease and desist from refusing to bargain collectively with Local 317, and to reinstate the drivers and make them whole for any loss of pay and other benefits commencing November 1, 1980.

Clinton's Ditch filed exceptions to the ALJ's decision and order with the National Labor Relations Board. Except for

slight modifications, a three-member panel of the Board affirmed the ALJ's rulings, findings, and conclusions, and adopted his recommended order.

Clinton's Ditch then appealed to the Court of Appeals, which vacated the Board's decision. The Second Circuit concluded that there was insufficient evidence to support the finding that Clinton's Ditch was a joint employer of the drivers and, additionally, held that Local 317 had failed to preserve its bargaining rights.

## REASONS FOR GRANTING THE WRIT

### I

### THE PROPER STANDARD APPLICABLE TO DETERMINATION OF JOINT EMPLOYER STATUS IS AN IMPORTANT ISSUE OF FEDERAL LABOR LAW THAT SHOULD BE ADDRESSED BY THIS COURT

Issues involving joint employer status are increasingly common in cases arising under the National Labor Relations Act.[1] It can fully be expected under the present economic climate, including deregulation and a plethora of new and unusual business arrangements, that these issues will place an ever increasing strain upon the stability of existing collective bargaining relationships. The Board and courts have struggled with determination of joint employer status. The confusion engendered by the numerous tests presently utilized makes evident the need for uniformity on this critical issue that strikes at the heart of the employer-employee relationship.[2]

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[1] A review of reported labor law decisions reveals that between 1975 and 1979 there were 13 federal court cases in which joint employer status under the Act was an issue. In contrast, between 1980 and 1984 there were 33 federal court cases involving the issue of joint employer status - an increase of approximately 250%.

[2] The circuit courts have adopted a variety of tests for determining whether an employer possesses sufficient control over employees to qualify as a joint employer. The Third, Fifth and Sixth Circuits look to the same factor used by the NLRB panel herein, that is, whether the employer "shared or co-determined matters governing the employees' essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982); *Ref-Chem Company v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985). The Fourth Circuit looks to whether the employer "possess[es] sufficient indicia of control over the work of the employees." *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271

This Court has recently reaffirmed the preeminence of stable bargaining relationships as a key to preserving industrial peace. In *NLRB v. Financial Institution Employees of America, Local 1182,* 106 S. Ct. 1007 (1986), overturning the Board's rule that non-union employees are entitled to vote in an affiliation election, the Court explained that:

> The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 U.S.C. §151. The Act includes several provisions designed to encourage stable bargaining relationships, . . . and the Board has devised rules to achieve the same ends. . . . Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer had doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

*Id.* at 1017.

2. - continued -

(4th Cir. 1970). The Eighth Circuit endorses the four factors applied by the Administrative Law Judge in this case, namely: 1) common ownership, 2) common management, 3) interrelation of operations and 4) centralized control of labor relations. *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir.), *cert. denied*, 449 U.S. 875 (1980). The Ninth Circuit concentrates on the degree of an employer's authority over employment conditions which are within the area of mandatory collective bargaining. *Sun Maid Growers v. NLRB*, 618 F.2d 56, 59 (9th Cir. 1980). The District of Columbia Circuit has scrutinized "the amount of actual and potential control . . . over . . . the employees." *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977).

The Second Circuit in this case ruled that a *sine qua non* of joint employer status was "sufficient evidence of immediate control" over the employees on a day-to-day basis.

That same policy consideration--maintaining industrial peace through stable bargaining relationships--is central to the joint employer issue. The Board's joint employer doctrine is akin to its single employer and alter ego theories which have been employed to enforce collective bargaining obligations against related employers. Like those doctrines, the Board's determination of joint employer status is bound up with the application of the policy objectives of the federal labor law:

> *The NLRA . . . has as one of its goals, the promotion of industrial peace through faithful performance of collective bargaining agreements.* 29 U.S.C. §151. We have seen that the Board has developed the single employer and alter ego theories in the context of unfair labor practice proceedings in which it is alleged that related employers have violated Sections 8(a)(5) and (1) of the NLRA by failing to abide by the terms of a collective bargaining agreement entered into by one of them. *Both of those theories are clearly designed to promote the faithful performance of a collective bargaining agreement not only by the signatory employer but also by a non-signatory employer with the requisite high degree of consanguinity to the signatory employer.*

*Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 511 (5th Cir. 1982) [emphasis supplied].

The potential of the joint employer question to disrupt stable bargaining relationships is fully realized in the instant case. Local 317 and Clinton's Ditch had an established bargain-

ing relationship manifested in successive labor agreements. Through a superficial business arrangement, but without any change in its substantive relationship with Local 317, Clinton's Ditch transferred its drivers to the payroll of a "contract" trucker. Coupled with this "paper" transfer was an express agreement between Clinton's Ditch and Local 317 to protect and preserve their core bargaining relationship.[3]

Nevertheless, on an essentially undisputed factual record, the Second Circuit refused to uphold the Board's finding that Clinton's Ditch was a joint employer and had violated its continuing obligation to bargain with Local 317. In so doing, the Second Circuit, contrary to national labor policy, allowed an employer to destroy an established collective bargaining relationship by artificial business maneuvering.

Although ostensibly eschewing the need to select among the numerous available tests for determining joint employer status, the Second Circuit, in fact, fashioned a more stringent test than that adopted by the Board or other circuits. Expanding on its decision in *International House*[4] -- that required *some* evidence of immediate supervision or control of employees -- the Second Circuit here applied a more diffcult standard of "sufficient evidence of immediate control" as essential reqirement for joint employuer status. This standard precludes finding a joint employer where total control over terms and conditions of employment, but not involvement in front-line supervision, exists in a party other than the nominal employer.[5]

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[3] The board has recognized the enforceability of such agreements to continue the employment of a group of employees under a union contract. *See eg., Liquid Carbonic Corporation*, 277 NLRB No. 91 (1985).

[4] *International House v. NLRB*, 676 F.2d 906 (2d Cir. 1982).

[5] The Second Circuit in *International House* cited favorably to *Industrial Personnel Corp., v. NLRB*, 657 F.2d 226 (8th Cir. 1981), *cert. denied*,

The pressing need for uniformity in this area of the law is highlighted in this case, by the application of three different test by the Administrative Law Judge, the Board, and the Second Circuit, yielding conflicting conclusions as to joint employer status.[6] Given the destabilizing effet of the joint employer issue on bargaining relationships, this Court should resolve the issue.

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5. - continued -

454 U.S. 1148 (1982), but that case would not survive the new *Clinton's Ditch* standard. In Industrial Personnel, B.F. Goodrich Co. had contracted with "IPC" to provide drivers for its midwest trucking operations. The Eight Circuit found that a joint employer relationship existed although IPC controlled direct labor relations, including interviews, hiring, disciplining, paying, and discharging of employees. The court held that B.F. Goodrich's control over working conditions inevitably would involve it in labor relations. Under the standard applied by the Second Circuit: in the instant case, however, focusing exclusively on "sufficient evidence of immediate supervision", B.F. Goodrich would presumably not have been found to be joint employer. Morever, while not criticizing, or even addressing, the standard applied by the Board in this case--whether Clinton's Ditch and Fairfield shared or codetermined matters governing the employees essential terms and conditions of employment--the Second Circuit vacated the Board's joint employer finding although the Board's standard was fully satisfied.

[6] Although the Board has not sought certiorari in this case, the question is important and recurrent. As this Court noted on an earlier occasion when it granted a private party's petition although the Board had declined to seek certiorari, [h]ad [that] party been denied intervention. . . "the decision of the Government not to apply for certiorari . . . would have unnecessarily postponed resolution on that important issue." *International Union, United Automobile Workers v. Scofield*, 382 U.S. 205, 214 (1965).

## II

## THE COURT OF APPEALS' DECISION CONFLICTS WITH THE CLEAR AND UNMISTAKABLE WAIVER STANDARD AND THE ENFORCEABILIITY OF ORAL AGREEMENTS UNDER THE ACT.

In declining to enforce Clinton's Ditch's commitment to continue the employment of drivers under Local 317 contract, the Court of Appeals, in effect, found a waiver by the Union. Such a finding is directly contrary to strict evidentiary requirements and public policy motivating against the finding of such waivers.

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983), this Court stated that a union's waiver of a statutory right must "be established clearly and unmistakably." The Court rejected the employer's contention that prior arbitration decisions between it and the union, together with the union's subsequent silence in negotations, established a union waiver of the right of union officers to engage in a strike.

Similarly, in *Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982), the court specifically held that union acquiescence does not constitute a "waiver" of statutory rights. In *Road Sprinkler Fitters*, the Board found that two affiliated companies formed to carry on "double breasted" operations did not violate Section 8(a)(5) of the Act when they refused to extend one affiliated company's bargaining agreement to the employees of the second affiliated company. In remanding the case to the Board a second time for explanation and proper application of the waiver standard, the court said:

> [The] heretofore accepted test for whether work has been transferred away from a bargaining

> unit is not union "acquiescence," but whether the employer's action has caused the bargaining unit to lose work that, in light of previously established practices, it would otherwise have been expected to perform. *The union may forego its right to bargain, but only by "waiver," not by "acquiescence." The Board has not applied the longstanding rule that waivers must be "clear and unmistakable" - nor has it explained why a different waiver standard is more consistent with the policy of the statute.* We must therefore reaffirm our previous conclusion that the Board has not engaged in the sort of reasoned decision making upon which a reviewing court must depend.

*Id.* at 833 [emphasis supplied].

In the instant case, Local 317 expressly stated and preserved its position that it would not relieve Clinton's Ditch of its responsibilities as employer [A-36]. Given that reservation of rights, there cannot be a finding of a clear and unmistakable waiver in Local 317's execution with Fairfield of a contract patterned after previous contracts with Clinton's Ditch, where Local 317 *knew* that (1) Clinton's Ditch was involved in the negotiations behind the scenes, and (2) Clinton's Ditch had told Local 317 that any labor agreement between Local 317 and Fairfield was subject to Clinton's Ditch's approval.

However, the Second Circuit, in refusing to enforce Clinton's Ditch's commitment, indicated that if Local 317 had "intended to bind Clinton's Ditch to its earlier oral assurance, . . . it should have tried to bring Clinton's Ditch to the bargaining table in 1978" [A-19]. The court found a waiver,

despite the circumstances described above establishing that there was, in fact, no waiver, to say nothing of a "clear and unmistakable waiver."

Moreover, in refusing to give effect to the oral agreement of Clinton's Ditch with Local 317 that provided for the continued employment of drivers under Local 317 agreement in the event of termination of the Fairfield arrangement, the court below departed from statutory language and decisional law holding that such oral commitments are fully binding under Section 8(d) of the Act.[7] Under Section 8(d), there is no provision that an agreement between an employer and a union must be in writing in order to be binding. Indeed, Section 8(d) makes it an additional and independent violation for an employer to refuse, upon request, to reduce to writing an agreement with the union.[8]

There is also nothing in the Act that would limit Clinton's Ditch's oral agreement - by its terms governing future events - to the written contract then existing. In fact, courts have found employers' agreements to honor contracts negotiated by unions and employer associations to be binding as to contracts negotiated years after the agreement was signed.[9]

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[7] The Courts have long recognized the enforceability of oral agreements under the Act. *See e.g., Conway's Express v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952).

[8] *See H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

[9] *See NLRB v. Pacific Intercom Co.*, 679 F.2d 900 (9th Cir. 1982), *enforcing* 255 NLRB 184 (1981) (employer's letter of assent signed in 1972 bound it to association contract effective from 1978 to 1980); *Ted Hicks and Associates, Inc. v. NLRB*, 572 F.2d 1024 (5th Cir. 1978) (employer's agreement in 1974 to abide by union/association contract signed in 1969 obligated it to later agreements between union and association, inciuding 1976-78 agreement).

The court's decision below does substantial violence to these longstanding statutory and decisional law principles that pin the primary focus of the Act - enhancement of stable bargaining relationships, *see NLRB v. Financial Institution Employees of America, Local 1182, supra.*

## III

## THE COURT OF APPEALS MISAPPLIED THE SUBSTANTIAL EVIDENCE STANDARD AND FAILED TO TAKE ACCOUNT OF RECORD EVIDENCE SUPPORTING THE BOARD'S JOINT EMPLOYER FINDING

The proper standard for judicial review of Board decisions has long been established. A decision of the National Labor Relations Board must be enforced if it is supported by "substantial evidence on the record as a whole." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 229 (1938). Thus, the Board's determination may not be set aside merely because a reviewing court would, as an original matter, decide the case the other way. As the Court said in *Universal Camera*: "Nor does [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiable have made a different choice had the matter been before it *de novo*." 340 U.S. at 488.[10]

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[10] In addressing the issue of judicial review in a similar context -- application of the clearly erroneous standard to a trial court's findings -- this Court explained that:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in

Moreover, it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charges as violative of its terms." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). The Board must be accorded deference and discretion in accomplishing this task. The finding of the Board that is overturned in this case, that of joint employer, is a "mixed question of law and fact which is within the expertise of the Board", such that the Board's finding must be given "great weight" on review. *NLRB v. Lumber & Mill Employers*, 736 F.2d 507 (9th Cir.), *cert. denied,* 105 S. Ct. 333 (1984).

Application of the foregoing principles to the facts of this case demonstrates that the Second Circuit has eviscerated the substantial evidence standard. In holding that the Board's determination that Clinton's Ditch was a joint employer was not supported by substantial evidence, the Second Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record. The Board's finding of a joint employer relationship was based on essentially undisputed evidence regarding the relationship between Fairfield and Clin-

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10. - continued -

> diversion of judicial resources. In addition, *the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.* As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous-standard - with its deference to the trier of fact - is the rule, not the exception.

*Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1513 (1985) [emphasis supplied].

ton's Ditch and the respective control each exercised over the drivers. The Board, after considering the evidence, concluded that Clinton's Ditch and Fairfield were joint employers because "they shared or codetermined matters governing the essential terms and conditions of employment of the drivers." [A-22].

The Second Circuit, substituting its own view of the facts for that of the Board and disregarding credited testimony for "better" evidence, concluded that "there is insufficient evidence to support the Board's determination that Clinton's Ditch and Fairfield were joint employers of the drivers"[A-20]. Since the Board's interpretation of the facts was neither illogical or implausible, it should have been given effect. Indeed, examination of the record in light of the appropriate deferential standard plainly reveals that the Board's determination was supported by substantial evidence. In "reweighing the facts . . . , the Court of Appeals improperly substituted its own views of the facts for those of the Board. *NLRB v. Plumbers Local 638,* 429 U.S. 507, 532 (1977).

**Evidence on the Joint Employer Issue.**

The NLRB in this case conducted nine days of hearings. The record included, on the joint employer issue, evidence that: Clinton's Ditch had complete control over delivery schedules on a daily basis, and regularly changed drivers' destinations, delivery times and scheduled runs. Clinton's Ditch's own consultant's report noted that day-to-day operations required a "fully controlled" delivery fleet. The Board specifically found extensive day-to-day control of drivers of Clinton's Ditch [A-60].

While the court below discounted the conclusions to be drawn by that involvement, it did not mention an important fact that bears heavily on the issue of who, in fact, supervised

the drivers. The record established the *absence* of any Fairfield personnel at the Clinton's Ditch premises to supervise the drivers during substantial periods of time, necessitating supervision of the drivers by Clinton's Ditch. Thus, from January, 1979 until December, 1979, there were no less than 150 work days during the Monday through Friday work week when there were *no* Fairfield employees at the premises prior to 2:30 p.m. From January through April, 1980, a similar pattern is exhibited. Moreover, the Fairfield dispatcher was regularly absent from the Clinton's Ditch facilities and, therefore, was unavailable for contact by the drivers, from approximately 10:00 a.m. to noon, every day.

The record also established that the Fairfield dispatcher, beginning in July, 1979, was frequently absent from the Clinton's Ditch premises for golf, and for his regular Monday meeting from 9:00 a.m. until noon at Fairfield's offices elsewhere, *and* had a practice of regularly leaving Clinton's Ditch premises during the day. These undisputable facts show that for substantial blocks of working time, the only supervision of the drivers that was *available* was that of Clinton's Ditch. This is fully consistent with the Board's finding that, aside from mechanical troubles with the equipment, drivers were supervised by Clinton's Ditch [A-60].

There is other indisputable evidence in the record that supports the Board's joint employer finding. The Clinton's Ditch consultant's 1980 report described the arrangement between Clinton's Ditch and Fairfield "as a form of private carriage in which Fairfield serves as C.D.'s operating agent". Clinton's Ditch traffic manager Vinette testified at the hearing that he exercised *the same control over the Global drivers as he had previously with the Fairfield drivers* and operated under the same procedures, with Global, as during Fairfield's tenure. In turn, documentary evidence establishes that the drivers of Global were under the "exclusive control and direc-

tion" of Clinton's Ditch, "just as if they were directly employed by [Clinton's Ditch]" [A-56]. Under the agreement between Global and Clinton's Ditch, Clinton's Ditch could terminate drivers, retained day-to-day control of the drivers, and retained the right of approval of wage increases for the drivers. Thus, Clinton's Ditch's admissions and its own documents provide support for what the facts bear out -- that Clinton's Ditch in effect remained the employer of the drivers, notwithstanding the paper transaction of putting the drivers on the Fairfield payroll.[11]

The term "employer" under the Act, 29 U.S.C. §152(2), includes "any person acting as an agent of an employer, directly or indirectly". It was certainly within reason for the Board to conclude that Fairfield was acting as the agent of the employer, Clinton's Ditch, within the meaning of the Act. The Board "could properly make the appraisal that the facts, circumstances and warranted inferences" compelled a joint employer finding. *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960).

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[11] In its decision, the court below noted the lack of any evidence to suggest that after the Fairfield takeover, Clinton's Ditch continued to play any role either in the hiring or firing of drivers. However, the entire group of drivers employed by Clinton's Ditch was taken over by Fairfield, and there was no change in the cadre of drivers during the Fairfield tenure. Thus, a lack of Clinton's Ditch involvement in the hiring and firing of any drivers would have little meaning in the circumstances of this case.

With respect to other facts in the record, the court seemed to substitute its own judgment as to the value of record evidence. For instance, on the issue of supervision, the court stated that frequency of calls from drivers to Clinton's Ditch was "limited", based on *collect* call records. This does not take into account the NLRB's express finding of fact that drivers continued to Clinton's Ditch by means other than collect calls [A-42].

In sum, the record in this case clearly contains substantial evidence to support the Board's determination of joint employer status. Accordingly, the Board decision should have been enforced, even if the Second Circuit would have decided the case differently in the first instance.[12]

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11. - continued -

Similarly, the court discounted the testimony that Fairfield told the Union that it had to consult with Clinton's Ditch before agreeing to a labor contract - testimony that is entirely consistent with Clinton's Ditch's having told the Union that *it would have to approve any Fairfield agreement with Local 317.*

There is no basis for the court to discount findings of fact based upon its view of the weight to be accorded certain types of evidence. Such an approach was specifically rejected by this Court in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 407 (1962) as inconsistent with the substantial evidence standard.

The court below also seemed to place some reliance on what it characterized as "subcontract" from Clinton's Ditch to Fairfield. But how the relationship is labelled is irrelevant, since the question of control over the work of the employees by Clinton's Ditch sufficient to find joint employer status, is "unaffected by any possible determination as to [Fairfield's] status as [subcontractor]. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) and *NLRB v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966).

[12] *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 822 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 850 (1986) ("Our standard of review is thus despositive. We may not 'displace the Board's choice between two fairly conflicting views, even though the court could justifiably have made a different choice had the matter been before it *de novo*.' [*Universal Camera, supra.*]"

## CONCLUSION

A fundamental goal of federal labor policy is the preservation of industrial peace by promoting stability in collective bargaining relationships. The decision of the court below, vacating the Board's joint employer finding, is contrary to that goal. Additionally, this case presents an appropriate vehicle for this Court to resolve the conflict among the circuits as to the appropriate standard for determination of joint employer status. Accordingly, the petition for certiorari should be granted.

Dated: April 18, 1986

Respectfully Submitted,

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# APPENDIX

## ORDER OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING HEARING, DATED JANUARY 24, 1986

### UNITED STATES COURT OF APPEALS
### SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of January one thousand nine hundred and eighty-six.

.....

**CLINTON'S DITCH COOPERATIVE CO., INC.**

*Petitioner-Cross-Respondent*

*- V -*

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent-Cross-Petitioner,*

**TEAMSTERS LOCAL 317**

*Intervenor.*

.....

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the INTERVENOR-TEAMSTERS LOCAL 317

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

*ORDER OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING HEARING, DATED JANUARY 24, 1986*

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

## OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985

### UNITED STATES COURT OF APPEALS

**For the Second Circuit**

**Nos. 1298, 1396** **August Term 1984**

**Argued: June 17, 1985** **Decided: December 5, 1985**

**Docket Nos. 85-4043, 85-4051**

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**CLINTON'S DITCH COOPERATIVE CO., INC.,**

*Petitioner-Cross-Respondent,*

*– against –*

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent-Cross-Petitioner,*

**TEAMSTERS LOCAL 317,**

*Intervenor.*

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Before: VAN GRAAFEILAND and PRATT, *Circuit Judges, and RE, Chief Judge of the United States Court of International Trade*, sitting by designation.

Petition to review and set aside a decision and order of the NLRB: (1) finding Clinton's Ditch Cooperative Co., Inc. to have been a joint

employer when it subcontracted its trucking operation, thereby placing it in violation of 29 U.S.C. § 158 (a) (5) & (1); (2) ordering reinstatement of truck drivers with back pay; and, (3) requiring collective bargaining. Cross-petition for enforcement of the order.

Petition granted and cross-petition denied.

THOMAS W. BUDD, New York, NY (Robert A. Wiesen, Richard K. Muser, Clifton Budd Burke & DeMaria, New York, NY, of Counsel), *for Petitioner-Cross-Respondent.*

MARK S. McCARTY, Washington, DC (Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Elinor Hadley Stillman, National Labor Relations Board, Washington, DC, of Counsel), *for Respondent-Cross-Petitioner.*

JAMES R. LaVAUTE, Syracuse, NY (Blitman & King, of Counsel), *for Intervenor.*

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

PRATT, *Circuit Judge:*

Clinton's Ditch, a cooperative, bottles and cans Pepsi Cola and related products at its plant in Cicero, New York. Until September 1976 Clinton's Ditch directly employed approximately fifteen drivers to distribute these products to members of the cooperative. The drivers were represented by Local 317 of the International Brotherhood of Teamsters (the "union"). The union had entered into a series of collective bargaining agreements with Clinton's Ditch, the last of which ran from February 1975 until February 1978, when the union reached a bargaining agreement with Fairfield Transportation Corporation, which had received a subcontract for the Clinton's Ditch trucking operation in 1976. In 1980 Fairfield terminated its contract, and Clinton's Ditch entered into a new subcontract with Global Leasing, Inc.

The core issue in this case is whether, despite the subcontracting arrangement with Fairfield, Clinton's Ditch remained a joint employer of the drivers so that it was required to bargain collectively with the union before entering into its new subcontract with Global. To resolve that issue we must take a close look at the facts, which are essentially undisputed.

### FACTS

When Clinton's Ditch ran its own trucking operation it was supervised by Robert Venette. For a six-year period ending in September 1976 Venette had direct responsibility over trucking and loading operations, including all aspects of dispatching and supervising the drivers. After receiving shipping tickets for the following day's deliveries, requested by coop members, Venette would prepare and post a dispatch sheet listing drivers' destinations and starting times. As required by the collective bargaining agreement, Venette would assign these runs, which varied in their length and their value to the drivers, on the basis of seniority.

After arriving at work in the morning, drivers would pick up their paperwork, including instructions on backhauls, and depart on their assigned runs. When drivers had problems with customers or equipment, they contacted Venette. If a driver had not exceeded his maximum legal driving hours after finishing a first run, he normally would take the most lucrative run left on the dispatch sheet; on occasion Venette would assign a second or third run not listed on the dispatch sheet. In addition, drivers moved empty trucks around the Clinton's Ditch yard at Venette's direction (referred to as "spotting").

The trucks used by Clinton's Ditch to deliver its products consisted of tractors that carried the Clinton's Ditch logo and trailers that carried the Pepsi Cola logo. Clinton's Ditch rented its trucks from Ryder Rental Corporation, which maintained and serviced the equipment at a Clinton's Ditch garage located approximately 400-500 feet from the bottling plant.

At a September 2, 1975, meeting between Clinton's Ditch and union representatives, Clinton's Ditch informed the union that Fairfield was going to take over the trucking operation for Clinton's Ditch, but that there would be no substantive changes and that all of Fairfield's actions would be subject to the approval of Clinton's Ditch. Clinton's Ditch informed the union that Fairfield initially would just take care of the trucks, but that it eventually would take care of scheduling runs and dispatching drivers. Clinton's Ditch also informed the drivers that if the new arrangement did not work out, Clinton's Ditch would buy back the equipment and the drivers would be reemployed by Clinton's Ditch.

In January 1976 Fairfield purchased the trucks from Ryder and leased them to Clinton's Ditch. Fairfield also maintained the vehicles, as Ryder had done, in the Clinton's Ditch garage, which it rented for one dollar annually. Despite the change in ownership and maintenance of the equipment, however, the trucking operation maintained essentially the same until September 1976, with Clinton's Ditch continuing as the direct employer of the drivers.

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

In May 1976 Clinton's Ditch and Fairfield entered into an agreement providing that Fairfield would assume Clinton's Ditch's responsibilities under the collective bargaining agreement with the union. The agreement required Fairfield to transport or pick up materials at the places, dates, and times specified by Clinton's Ditch. It also set the rates for Fairfield's compensation. Either party could terminate the agreement on 90 days' written notice, in which event Clinton's Ditch was obligated to repurchase the trucks. The agreement further provided that the rates paid Fairfield were subject to a request for adjustment which would be given "sympathetic consideration". Fairfield was required to obtain the approval of Clinton's Ditch before replacing any equipment.

This agreement went into effect on September 20, 1976. By letter dated September 7, Clinton's Ditch notified the union and the drivers that "effective Monday, September 20, 1976, [Clinton's Ditch] will transfer our trucking over to [Fairfield] along with the collective bargaining agreement * * *. The drivers will be transferred to [Fairfield's] payroll on that date also." In a letter dated September 9 Clinton's Ditch asked the union to acknowledge that Fairfield would be the driver's employer after the transition. Four days later, the union refused by letter to agree that Fairfield would be considered the drivers' employer. The union also reminded Clinton's Ditch that Clinton's Ditch had previously assured the union that when Fairfield took over nothing would change, and that in the event the Clinton's Ditch/Fairfield arrangement was terminated in the future, present employees would be rehired by Clinton's Ditch or another contract trucker. Clinton's Ditch did not respond.

On September 20, all regular drivers were transferred to the Fairfield payroll with no diminution in seniority or benefits. Clinton's Ditch, however, did continue to pay the drivers' vacation pay until the end of the 1976 calendar year. Clinton's Ditch also continued to provide the drivers with small benefits (a Thanksgiving turkey, an annual clambake, and two cases of soda a week) throughout the entire period of the contract with Fairfield.

Operations did not change substantially; the drivers continued to service the same customers out of the same garage with the same trucks. However, there was a new dispatcher, a Fairfield employee, who was trained by Venette for two months following the transition. Venette later helped train another Fairfield dispatcher, although for a shorter period of time.

Venette continued to prepare for Clinton's Ditch the lists of destinations, delivery times, and backhauls, which he gave to the Fairfield dispatcher for preparation of the dispatch sheets. On occasion, Venette or some other employee of Clinton's Ditch would change a Fairfield driver's assignment by directly contacting him by telephone at one of his stops, ask drivers to move empty trailers around the Clinton's Ditch yard, or ask them to take runs not listed on the dispatch sheet. The drivers had standing orders from Fairfield to follow such directions from Clinton's Ditch personnel.

The drivers were also under instructions to call Clinton's Ditch if they had problems in the field with the product, delivery, or pick-up, but to call Fairfield if they had problems with the trucks. Venette occasionally attached notes to delivery instructions telling a driver to call Clinton's Ditch upon arriving at the destination, or to pick up a check from the coop member.

Clinton's Ditch informed members of the cooperative that the drivers were now Fairfield employees, but that if the members had any problems with the drivers, they should contact Clinton's Ditch. Several times, members complained to Clinton's Ditch about the behavior of drivers. Clinton's Ditch forwarded these complaints to Fairfield, and, on occasion, discussed such matters with Fairfield or lodged written complaints with Fairfield. Fairfield then would investigate the matter and take appropriate action; it often, but not always, informed Clinton's Ditch of the action. On a few occasions when Clinton's Ditch requested that Fairfield take specific action against particular drivers, Fairfield did so.

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

In late 1977 and early 1978 the union met with Fairfield to negotiate a successor collective bargaining agreement. According to the union representative, Fairfield continually stated that it had to check with Clinton's Ditch before it could agree to a union proposal. Ultimately, Fairfield and the union reached a new agreement that ran until February 1981. Clinton's Ditch was not a party to that agreement.

Following unsuccessful negotiations over a rate increase, Fairfield notified Clinton's Ditch on July 29, 1980, that Fairfield would terminate the contract on October 31, 1980, unless a new agreement could be reached by that date. Even prior to receiving this notice, Clinton's Ditch had begun contacting other trucking companies as possible replacements for Fairfield in the event the contract was terminated. In late August, Clinton's Ditch met with Global Leasing, Inc., which presented a written proposal.

By letter dated October 16, 1980, Fairfield informed the union that all drivers would be permanently laid off on October 31, 1980. Upon receipt of the letter, the union president, Hall, asked Fairfield's president, Durkin, what was going on. Durkin informed him that the matter was out of his hands and that Hall should talk to Clinton's Ditch. After attempting unsuccessfully to reach Clinton's Ditch's president, Woodruff, by telephone, Hall went to Clinton's Ditch's facility where he spoke with Woodruff and asked to be kept informed so that he could protect the employees' rights. Woodruff informed Hall that he had asked Fairfield for a thirty-day extension of their contract, but that Fairfield had refused to grant it, and that Hall should deal with Fairfield's Durkin. Hall again spoke with Durkin, who informed him that he was "washing his hands, it's between you and Clinton's Ditch".

In mid-October, Clinton's Ditch told Global to prepare to supply drivers as of November 1. On October 23 Clinton's Ditch's board of directors approved a proposal to replace Fairfield by entering into a subcontract with Global. The Global contract was signed on October 29, 1980.

On October 30 the union sent the following telegram to Clinton's Ditch:

> Teamster Local 317 has been advised that it is your intention to terminate your relationship with Fairfield Transportation Corporation whereby that company has been utilized to meet the trucking needs of Clinton Ditch Co-op Company Incorporated. As you know, this work was performed until 1976 by employees of your company under a collective bargaining agreement with this local [.] At that time your company agreed with this local that any trucking in the future would be done under a Local 317 agreement and that the contract trucker of Clintons Ditch would utilize the same drivers as had done this work originally for Clinton Ditch and later under the Fairfield agreement [.]
>
> We demand to meet with you to discuss this situation. It is this Local's position that your company may not now unilaterally arrange for this trucking to be performed by another contract trucker that does not have a contract with this Local and who does not employ the Fairfield (formerly Clinton Ditch) drivers. Please contact the undersigned immediately to arrange for such a meeting.

Clinton's Ditch did not respond.

Fairfield sold its tractors to Ryder Rental Corporation and its trailers to Lincoln Leaseway; these companies then leased the equipment, which still carried logos of Clinton's Ditch and Pepsi Cola, to Clinton's Ditch for use by Global's drivers.

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

Upon the filing of a charge by the union on November 5, 1980, general counsel for the National Labor Relations Board issued a complaint alleging, *inter alia*, that Clinton's Ditch had unlawfully subcontracted its trucking operations to Global in violation of § 8 (a) (1) and (5) of the National Labor Relations Act. 29 U.S.C. § 158 (a) (1) and (5). Following a hearing in early 1982 an administrative law judge issued a decision finding that Clinton's Ditch was a joint employer of the drivers along with Fairfield, that Clinton's Ditch's decision to contract the work out to Global was a mandatory subject of bargaining, and that the union had made a timely request to bargain. The ALJ therefore concluded that Clinton's Ditch had violated the act by failing to bargain with the union. The ALJ recommended an order requiring Clinton's Ditch to cease and desist from refusing to bargain collectively with the union, and to reinstate the drivers and make them "whole" for any loss of pay and other benefits commencing November 1, 1980.

Clinton's Ditch filed exceptions to the ALJ's decision and order with the National Labor Relations Board. Except for slight modifications, a three-member panel of the board affirmed the ALJ's rulings, findings, and conclusions, and adopted his recommended order.

Clinton's Ditch has appealed from the board's decision and order contending that there is insufficient evidence on the record to support some of the board's essential findings: 1) that Clinton's Ditch was a joint employer of the drivers; 2) that Clinton's Ditch failed to negotiate regarding a mandatory subject of bargaining; and 3) that the union made a timely demand to bargain. Since we conclude that there was insufficient evidence to support the board's finding that Clinton's Ditch was a joint employer of the drivers, we do not reach the other issues.

## DISCUSSION

Whether Clinton's Ditch possessed sufficient control over the Fairfield drivers to qualify as a joint employer "is essentially a factual issue", *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), and the board's resolution of that question is conclusive if " ' supported by substantial evidence on the record considered as a whole' ". *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982) (quoting 29 U.S.C. § 160 (e) (1976)).

The ALJ examined four factors to determine whether Clinton's Ditch was a joint employer: 1) common ownership, 2) common management, 3) interrelation of operations, and 4) centralized control of labor relations. The NLRB panel agreed with the ALJ's conclusion that Clinton's Ditch was a joint employer, but based its conclusion only on the ALJ's finding that Clinton's Ditch and Fairfield "shared or codetermined matters governing the essential terms and conditions of employment of the drivers." The panel stated that "[w]e do not rely on his discussion of other factors that are relevant only in the single employer context."

In *International House* we recognized that this circuit had not yet addressed the proper standard for determining whether an employer " 'possessed sufficient control over the work of the employees to qualify as a joint employer' ", but that other circuits had adopted a variety of tests for making this determination. *International House*, 676 F.2d at 912 (quoting *Boire*, 376 U.S. at 481). We noted that:

> The Eighth Circuit, for example, endorses the four factors applied by the Administrative Law Judge in this case. *Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir.), *cert. denied*, 449 U.S. 875 * * * (1980). The Ninth Circuit concentrates on the degree of an employer's "authority over employment conditions which are within the area of mandatory collective bargaining." *Sun Maid Growers v.*

> *NLRB*, 618 F.2d 56, 59 (9th Cir. 1980). The D.C. Circuit has scrutinized "the amount of actual and potential control * * * over the * * * employees." *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977).

*Id.* at 913 (footnote omitted).

Other formulae are not lacking. The fourth circuit has posed the question as whether the employer "possess[es] sufficient indicia of control over the work of the employees". *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (4th Cir. 1970) (per curiam). The third and fifth circuits look to the same factor used by the NLRB panel here, namely, whether the employer shared or codetermined matters governing the employees' essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Ref-Chem Company v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969).

The Supreme Court has endorsed the four-factor test, but only in the context of determining whether a group of employers are actually a "single employer", not whether they are "joint employers". *See, e.g., Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam).

A "single employer" situation exists "where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer' ". *Browning-Ferris Industries*, 691 F.2d at 1122. The single employer standard is relevant when "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise' ". *See NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960).

In contrast, in a "joint employer" relationship, there is no single integrated enterprise. A conclusion that employers are "joint" assumes that they are separate legal entities, but that they have merely chosen to handle certain aspects of their employer-employee relationships jointly. *Browning-Ferris Industries*, 691 F.2d at 1122. Thus, the third circuit reasons that

> In "joint employer" situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in "single employer" cases. * * * "[I]t is rather a matter of determining which of two, or whether both, [employers] control, in the capacity of employer, the labor relations of a given group of workers." *NLRB v. Condenser Corp. of America*, [128 F.2d 67, 72 (3d Cir. 1942)] (citations omitted). The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.

*Id.* at 1122-23.

Despite these disparate approaches, we conclude here, as we noted in *International House*, that "[w]e see no need to select among these approaches or to devise an alternative test * * *", 676 F.2d at 913, because we find that an essential element under any determination of joint employer status in a subcontracting context is lacking here – sufficient evidence of immediate control over the employees. We have weighed five factors in reaching this conclusion.

1. *Hiring and firing.* The ALJ found that "it appears that hiring and firing was done by Fairfield". When it first took over the trucking operation Fairfield did inherit the entire workforce of employees that

had been hired by Clinton's Ditch and therefore had no independent input into their initial hiring. In essence, however, Fairfield chose to hire all of these individuals when it agreed to take over Clinton's Ditch's collective bargaining contract with the union. There is no evidence in the record to suggest that after the takeover Clinton's Ditch continued to play any role either in the hiring decisions or in the firing of any drivers.

2. *Discipline.* The ALJ found that Clinton's Ditch "effectively disciplined drivers". There was no evidence that Clinton's Ditch directly administered any discipline to the drivers, so this finding must rest primarily on evidence that Clinton's Ditch notified members of the coop that they should contact Clinton's Ditch if they had "any problems" with, or encountered "foul or abusive language" from the drivers, and that Clinton's Ditch on several occasions complained to Fairfield about certain drivers and expected appropriate action to be taken. But any business has a legitimate interest in determining if its subcontractor's employees have offended its customers or have otherwise provided unsatisfactory service. Once Clinton's Ditch became aware of problems with Fairfield's drivers -- either on its own or through customer complaints -- the only sensible course of action was to report these problems to Fairfield. An employer need not mutely suffer incompetence or misbehavior by its subcontractor's employees in order to avoid status as a joint employer.

3. *Pay, insurance, and records.* The ALJ found that Fairfield maintained records of the drivers' hours and handled the payroll, including withholding of social security and income taxes. There is no evidence suggesting that Clinton's Ditch provided insurance for the drivers. The only evidence that Clinton's Ditch provided any employee benefits is that it provided vacation pay for the drivers during the first three months of the contract with Fairfield, and that it provided certain minor benefits (sodas, a turkey, and a clambake) to the drivers throughout the contract with Fairfield. The payment for

vacations during a short transitional period has little significance for the question of Clinton's Ditch's status four years after those payments stopped. As to the other benefits, the record shows that Clinton's Ditch gave similar benefits to various individuals, some only remotely connected to Clinton's Ditch. Such *de minimis* benefits are insignificant in analyzing joint employer status.

4. *Supervision.* The ALJ found that

> [e]ven acknowledging that some of the drivers exaggerated the numbers of times that Venette contacted them in the field or that they contacted Venette while they were in the field it is still crystal clear that as a practical matter the entry of Fairfield on the scene only introduced one supervisory level individual between the drivers and Venette, namely, the Fairfield dispatcher.

We disagree; far more substantial changes developed with Fairfield's entry into the employment picture.

It is true that drivers did, on occasion, contact Clinton's Ditch directly in response to instructions attached to their delivery papers. But the frequency of such calls was limited. In its brief, the NLRB notes that in a twenty-two month period, the drivers made 55 collect phone calls to Clinton's Ditch; assuming that the purpose of every call was to receive instructions from Clinton's Ditch, this still would mean that Clinton's Ditch supervised each driver in this matter on an average of less than once every six months. Even though drivers may have also occasionally made direct calls, such infrequent contact hardly suggests any meaningful supervision by Clinton's Ditch.

The ALJ also found that Clinton's Ditch influenced the drivers' pay by assigning some "second runs" and "spotting". However, most second runs were selected on a first-come, first-served basis by the

drivers themselves from a dispatch sheet prepared by a Fairfield dispatcher. In addition, the amount of spotting the drivers performed was insignificant. For example, in the six-month period immediately preceding the transition to Global, the drivers performed a total of [illegible] "spots"; assuming Clinton's Ditch personnel assigned all these "spots", this averages out to less than one "spot" per driver per month.

Considered as a whole, assignments and requests by Clinton's Ditch that were not cleared with or approved by Fairfield had an insignificant effect on drivers' pay and fell far short of the day-to-day supervision found by the ALJ. Moreover, we attach no significance to the fact that Venette trained the new dispatchers; it would have hardly led to an effective changeover to permit an untrained new dispatcher to "reinvent the wheel".

5. *Participation in the collective bargaining process.* Clinton's Ditch did not attend the 1978 bargaining negotiations between Fairfield and the union, nor did it sign the collective bargaining agreement ultimately reached. The ALJ explicitly credited the testimony of the union's bargaining agent to the effect that Fairfield representatives "continually had to consult with Clinton's Ditch" during the bargaining process, implying that it was Clinton's Ditch rather than Fairfield that was actually making the decisions. Realistically, whether Fairfield, who had only one customer – Clinton's Ditch – could afford any changes requested by the union during negotiations would depend in part on Clinton's Ditch's willingness to adjust the rates governing its payments to Fairfield. Such economic interdependence, however, does not make Clinton's Ditch the drivers' employer – especially when additional factors necessarily entered into Fairfield's economic calculus. Moreover, all that the bargaining agent testified was that the Fairfield representative continually *said* that he had to consult with Clinton's Ditch before he could make any binding agreement. There is nothing to show whether he actually did so or whether he made these statements as a bargaining ploy.

The bargaining agent did state more specifically that the Fairfield representative said Clinton's Ditch had requested the insertion of a clause in the contract to insure that the drivers would not honor a picket line by Clinton's Ditch's production employees if those employees went on strike. An internal Fairfield memoranda, copied to Clinton's Ditch, indicated that Fairfield was willing to accede to a union request *not* to insert such a clause if this "was acceptable to Clinton's Ditch". Ultimately, however, the clause was incorporated into the bargaining agreement.

Thus, it is a fair inference that Clinton's Ditch did pressure the parties to include this clause. Standing alone, however, we find this slight intrusion into the bargaining process insignificant. Parenthetically, we note that the NLRB's reliance on this episode to support joint employer status is ironic. By the very wording of the clause, the union recognized "the complete separation of Clinton's Ditch and Fairfield Transporation" in resolving disputes.

Absent evidence that more extensive consultations about the bargaining agreement actually occurred, there is no basis for concluding that Clinton's Ditch controlled or manipulated the bargaining to an extent indicative of joint employer status.

6. *Evaluation and conclusion.* We have found no other case presenting the exact combination of factors as those before us. One factor here, the limited supervision exercised by Clinton's Ditch over the drivers, tends to support a finding of joint employer status. But this factor is not determinative. *See Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275, 1279 (8th Cir.) (employer was not a joint employer of trucking subcontractor's employees, even though the employees occasionally took directions from employer, when subcontractor's own assistant managers directed routes and procedures pursuant to a run sheet received from employer's dispatcher and were solely responsible for the hiring, discipline, and firing of its own employees), *cert. denied*, 449 U.S. 875 (1980).

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

This is not a case in which Clinton's Ditch merely leased drivers from Fairfield and then treated them as its own employees. Rather, it was Fairfield or its dispatchers that: hired and fired drivers; disciplined drivers; handled drivers' records, payroll, and taxes; supervised drivers in their day-to-day work; and bargained collectively with the drivers' union. Clinton's Ditch did not participate in hiring and firing, and had only an indirect, limited connection to problems of pay, discipline, or any other aspect of labor relations. *Cf. Ref-Chem Company v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969) (joint employer had right to approve employees, to control the number of employees, to have an employee removed, and to approve pay changes and overtimes); *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124-25 (3d Cir. 1982) (joint employer shared the right to effectively discharge and hire subcontractor's employees, helped determine their compensation, shared in their day-to-day supervision, and generally acted as boss).

We recognize that when Fairfield first undertook the subcontract, Clinton's Ditch apparently informed the drivers that if the new arrangement did not work out, the truck drivers would continue to be Clinton's Ditch employees. If the instant dispute had arisen under the 1975-78 collective bargaining agreement, we would be inclined to give consideration to the effect of both this oral assurance and the union's refusal to recognize that Clinton's Ditch was no longer an employer of the drivers. But the dispute arose under a new collective bargaining agreement – to which Clinton's Ditch was not a party – between Fairfield and the union. Had the union intended to bind Clinton's Ditch to its earlier oral assurance, or formally to extend the employer-employee relationship between Clinton's Ditch and the drivers, it should have tried to bring Clinton's Ditch to the bargaining table in 1978. But that chance is long-past. The earlier assurance, even coupled with the union's refusal to release Clinton's Ditch from the 1975-78 bargaining agreement, lost its effect when the union began dealing directly with Fairfield.

## *OPINION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 5, 1985*

We conclude that there is insufficient evidence to support the board's determination that Clinton's Ditch and Fairfield were joint employers of the drivers. Petition to review and vacate the board's decision and order granted. Cross-petition for enforcement denied.

## DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985

DHDe
D--2705
274 NLRB No. 103 Syracuse, NY

## UNITED STATES OF AMERICA
## BEFORE THE NATIONAL LABOR RELATIONS BOARD

**CLINTON'S DITCH COOPERATIVE CO., INC.**

and Case 3--CA--10085

**TEAMSTERS LOCAL 317, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA**

## DECISION AND ORDER

On 5 January 1983 Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, a supporting brief, and an answering brief, and the General Counsel filed a brief in support of the judge's decision.[1]

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[1]Thereafter, the Respondent and the Charging Party filed several letters calling to the Board's attention a number of recently issued Board decisions. Both parties move to strike the other's letters on the ground that they are untimely filed supplemental briefs because they contain agrument supporting their interpretation of the cited cases. We have considered the cases cited by the parties, but we have not considered any supporting argument. Therefore, both motions to strike are moot.

## *DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985*

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions[3] and to adopt the recommended Order as modified.[4]

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[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3]We agree with the judge's finding that the Respondent (Clinton's Ditch) and Fairfield Transportation Corp. (Fairfield) were joint employers because, as found by the judge, they shared or codetermined matters governing the essential terms and conditions of employment of the drivers. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). We do not rely on his discussion of other factors that are relevant only in the single employer context. In addition, we do not rely on his statement that it would be unjust for Clinton's Ditch to be found to be anything other than a joint employer.

We agree with the judge's finding that the appropriate remedy is a return to the status quo ante. The record contains no evidence that such a remedy would be unduly burdensome.

Chairman Dotson and Member Dennis find that the record contains insufficient evidence to support a conclusion that the Respondent agreed to be bound by the collective-bargaining agreement negotiated between the Union and Fairfield. They do not pass on the question whether the Respondent should be found to be obligated to honor the contract by virtue of its status as a joint employer. They note that inasmuch as the Board is finding that the Respondent violated Sec. 8 (a) (5) by unilaterally changing existing terms and conditions of employment and as the Board is ordering a status quo ante remedy, the employees' backpay will be based on the terms and conditions of employment established by the collective-bargaining agreement between the Union and Fairfield. Further, under the particular circumstances of this case, they agree with the judge that "[t]he purposes of the Act will be accomplished if the drivers are reinstated with backpay and both sides commence to bargain in good faith regarding a new contract between them."

Contrary to the judge, Member Hunter additionally would find that the Respondent is bound to the collective-bargaining agreement between Fairfield and

3. - continued -

the Union and that the Respondent's failure to apply that agreement was in abrogation of Sec. 8 (d) of the Act and violative of Sec. 8 (a) (5). He notes that the Respondent initially was party to a collective-bargaining agreement with the Union and that, although the Respondent and Fairfield subsequently entered into a contract which provided that the latter assume that collective-bargaining agreement and that it would provide a written release of the Respondent from the Union, the Union never gave such a release and made it clear that it would continue to look to the Respondent as the ultimate employer. Furthermore, although the Respondent did not actually execute the subsequent collective-bargaining agreement between Fairfield and the Union, it is clear that during the negotiations for that agreement Fairfield continuously informed the Respondent of the status of the negotiations, Fairfield had to secure the Respondent's approval before making any monetary commitments, and the Respondent sought and obtained language in the agreement to protect certain of its interests. Given these facts, coupled with the additional evidence concerning the Respondent's and Fairfield's joint employer status which indicates that in all essential aspects control over the trucking operations remained with the Respondent, Member Hunter considers it appropriate in the circumstances here to find the Respondent bound to the collective-bargaining agreement executed by Fairfield and the Union. In his view, to hold otherwise would be to ignore the realities of the relationship between the Respondent, Fairfield, and the Union. Further, and contrary to his colleagues, Member Hunter concludes that the remedy will be materially affected by a finding that the Respondent is bound to the collective-bargaining agreement. In so doing, Member Hunter notes, for example, that while the agreement contains a dues-checkoff provision obligating Fairfield to periodically withhold from employees' pay and remit to the Union certain amounts for union dues, the present order does not require that the Respondent reimburse the Union for lost dues and interest thereon. See *Fox Painting Co.*, 263 NLRB 437 (1982), affd. per curiam 732 F.2d 554 (6th Cir. 1984).

The judge incorrectly found that Fairfield employees other than one driver and dispatcher were generally not at the Clinton's Ditch premises before "2:45 a.m." instead of "2.45 p.m." He also incorrectly found that the Respondent did not commence looking for a new source of truckdrivers until "following receipt of the cancellation notice" from Fairfield; the record reveals that the Respondent contacted other trucking companies prior to that time. These errors are apparently inadvertent and have no effect on our decision.

4We have modified the judge's Conclusion of Law 3 and par. 2 (a) of his recommended Order to describe more accurately the violation found.

## *DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985*

We agree with the judge that the Respondent violated Section 8 (a) (5) by failing to bargain with the Union over its decision to subcontract its trucking operations, but we do so for the following reasons. In our recent decision in *Otis Elevator Co.*, 269 NLRB No. 162 (Apr. 6, 1984), we interpreted the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), as follows: "[T]he critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives." Slip op. at 6 (Emphasis in original.) We also stated that "[i]ncluded within Section 8 (d) . . . are all decisions which turn upon a reduction of labor costs." Slip op. at 8.

As found by the judge, the breakdown in negotiations for a new agreement between the Respondent and its joint employer, Fairfield, which ended their relationship, occurred because the Respondent would not agree to a rate increase based on labor costs. The record reveals that, when the relationship with Fairfield was ending, the Respondent contacted other companies concerning new transportation arrangements. The Respondent's General Manager Alan Woodruff spoke with Jack Bevans of Global leasing, Inc. (Global) on 26 August 1980. The next day Bevans wrote Woodruff the following letter, which reveals that labor costs were a key consideration in the negotiations between the Respondent and Global:

> As I told you in my conversation while in Syracuse, I recommend that these drivers be put under a union contract with the Brotherhood of Railway & Airline Clerks. I believe that Local 317 will do all in their power to organize this operation as they will be losing this membership. Any rates that I am quoting you I am sure that I will be able to negotiate with BRAC, but I do not want to contact the Union until such time as we know that this is the way it is going to go.

## *DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985*

On 29 October 1980, without notice to the Union, the Respondent and Global entered into an agreement for Global to supply drivers to the Respondent.

In sum, the Respondent's relationship with Fairfield ended because of labor costs, and the Respondent was looking for labor-cost savings when it entered into its relationship with Global. Furthermore, when the Respondent contracted with Global for drivers, there was no "change in the nature or direction" of the Respondent's business. *Otis Elevator*, supra. The Respondent still used the same leased equipment, but now it was leased from Ryder and Lincoln Leaseway instead of Fairfield. The Respondent still used leased drivers, but now they were leased from Global instead of Fairfield. The only difference in the Respondent's operation was that the drivers were a different group of employees. Therefore, we find that the Respondent's decision to subcontract its trucking operations "turn[ed] upon labor costs" within the meaning of *Otis Elevator*. Accordingly, it was a mandatory subject of bargaining.[5]

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[5]Member Dennis agrees that the Respondent was obligated to bargain over its decision to subcontract its trucking operation. Her analysis is based on her interpretation of the Supreme Court's *First National Maintenance* decision, as set forth in her concurring opinion in *Otis Elevator Co.* In her view, a two-step test is used in deciding whether a certain management decision is a mandatory subject of bargaining: "[T]he General Counsel must prove (1) that a factor over which the union has control was a significant consideration in the employer's decision, and (2) that the benefit for the collective-bargaining process outweighs the burden on the business." 269 NLRB No. 162, slip op. at 26. The burden elements to be considered in applying the second part of the test include: extent of capital commitment; extent of changes in operations; and the need for speed, flexibility, or confidentiality. In the instant case, Member Dennis agrees that labor costs (a factor over which the Union has control) were a significant consideration in the Respondent's decision to subcontract its trucking operation. Turning to the burden elements, she finds that the Respondent's decision involved no capital commitment, virtually no change in operations, and there is no evidence of a need for speed, flexibility, or confidentiality. Accordingly, she concludes that the General Counsel established that "the benefit" outweighs "the burden" and that the Respondent's decision was a mandatory subject of bargaining.

## *DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985*

Amended Conclusions of Law

Substitute the following paragraph 3 for that of the administrative law judge.

"3. By unilaterally subcontracting its trucking operation without bargaining with the Union over the decision or its effects on the unit employees, the Respondent engaged in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act."

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Clinton's Ditch Cooperative Co., Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the first sentence of paragraph 2 (a).

"(a) Offer those employees who were displaced by the unilateral subcontracting of the Respondent's trucking operation immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay and other benefits suffered by them commencing on 1 November 1980."

2. Substitute the attached notice for that of the administrative law judge.

*DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED FEBRUARY 28, 1985*

Dated, Washington, D.C. 28 February 1985.

.....

Donald L. Dotson, Chairman

.....

Robert P. Hunter, Member

.....

Patricia Diaz Dennis, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted by Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all truckdrivers who work out of our Cicero, New York, facility by contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the abovenamed labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to all the drivers displaced by the unilateral subcontracting of our trucking operation.

WE WILL pay backpay with interest to all driver-employees who were displaced by the unilateral subcontracting of our trucking operation.

WE WILL bargain collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the drivers who work out of our Cicero, New York, facility.

CLINTON'S DITCH COOPERATIVE CO., INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Federal Building, Room 901, Buffalo, New York 14202, Telephone 716–846–4951.

## ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983

JD-560-82
Syracuse, NY

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**

**CLINTON'S DITCH COOPERATIVE CO., INC.**

and Case 3-CA-10085

**TEAMSTERS LOCAL 317 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA**

*Alfred M. Norek Esq.*, and
*Robert M. Ellison, Esq.*,
of Albany, NY for the
General Counsel.
*Thomas W. Budd, Esq.*, of
New York, NY for the
Respondnet.
*James R. LaVaute, Esq.*,
of Syracuse, NY for
the Charging Party.

### DECISION

#### Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: Upon a charge filed on November 5, 1980, by Teamsters Local 317, Inter-

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Union or Local 317), the General Counsel for the National Labor Relations Board, by the Regional Director for Region 5, issued a Complaint, dated May 18, 1981, and an Amendment thereto, dated January 25, 1982. The Complaint, as amended, alleges that Clinton's Ditch Cooperative Co., Inc., (herein Respondent or Clinton's Ditch), in violation of Sections 8 (a) (1), 8 (a) (5) and 8 (d) of the National Labor Relations Act (herein the Act) unlawfully subcontracted its trucking operations. Respondent denied that it violated the Act in any way.

Nine days of hearings were held in February and March 1982 and the record was closed on April 29, 1982, upon receipt and admission of additional exhibits submitted by Respondent and the Charging Party.

Upon the entire record in this case, to include post hearing briefs filed on July 29, 1982, by General Counsel, Respondent, and Charging Party, reply brief filed by Charging Party, which I have considered over objection from Respondent, and Respondent's Opposition to the Charging Party's reply brief, and upon my observation of the demanor of the witnesses, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein, Respondent has maintained its principal office and place of business at Pardee Road, Cicero, New York and is, and has been at all times material herein, continuously engaged at said plant, place of business and facility, in the business of canning, bottling and distributing soft drink products and related services.

During the past twelve months, Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to its Cicero, New York plant, syrup and other goods and materials, valued in excess of $50,000, which were transported to said plant directly from States of the United States other than the State of New York.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

## II. Labor Organization

Teamsters Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2 (5) of the Act.

## III. The Unfair Labor Practices

Clinton's Ditch was formed in 1967, pursuant to the Farm Cooperative Laws of the State of New York. It exists for the purpose of bottling, canning and internally distributing Pepsi Cola and related products to its approximately fifteen members who have distribution rights within given geographical areas. The policies of Clinton's Ditch are determined by its fifteen member Board of Directors. Alan Woodruff, Clinton Ditch's general manager, has responsibility for overseeing day-to-day operations and is answerable to each coop member.

The employees of Clinton's Ditch involved in the canning and bottling of soft drinks have been represented by the United Steelworkers since Clinton's Ditch's Cicero, New York, facility went into operation in 1968. Since at least 1970, until September 20, 1976, Clinton's Ditch directly employed drivers represented by Local 317. Clinton's Ditch and Local 317 were parties to a series of three year

collective bargaining agreements, with the last agreement having a term February 2, 1975, through February 1, 1978.

Trucking Operations Prior to September 20, 1976

For the six year period prior to September 20, 1976, Robert Venette, a Clinton's Ditch supervisor had direct responsibility over the trucking and loading operations of Clinton's Ditch, including all aspects of dispatching, loading and supervision of drivers. Clinton's Ditch utilized trailers and tractors rented from Ryder. The tractors were marked with the Clinton's Ditch logo and trailers with Pepsi Cola logos. Until January 1, 1975, Clinton's Ditch had a full service maintenance agreement with Ryder for the equipment. Ryder maintained the equipment at Clinton's Ditch's garage located approximately 400-500 feet from the bottling plant. In January 1976 Fairfield Transportation Corp. (herein Fairfield) purchased the equipment from Ryder and proceeded to lease it back to Clinton's Ditch. At the same time Fairfield replaced Ryder in regard to the maintenance of the vehicles at Clinton's Ditch's garage, paying an annual rental of $1.00.

The work flow for driving started with coop members either sending in written orders or phone orders requesting delivery of specified products at certain dates and, where requested, specified times. On a daily basis Venette received shipping tickets listing the orders to be delivered for the following day.

From the shipping tickets, which he received at 9 - 10 a.m. in the morning, Venette prepared a dispatch sheet on which he listed the drivers' names, destination, backhauls, and starting times. As mandated in the labor agreement, Venette assigned drivers to runs on the basis of seniority, either in terms of distance of the runs or total amount of revenues. Drivers were paid for runs on the basis of mileage and a set dollar amount for a drop or pickup. In determining runs Venette had to take into consideration the drivers's ICC hours,

the utilization of tandems, i.e., two trailers pulled by one tractor which could only be driven on the New York State Thruway and the geographical area for back hauls. In practice, Venette utilized certain set tandem runs and single runs and was familiar with the seniority of the top 12 of the 15-20 member crew of drivers.

In the afternoon the dispatch schedule was posted, either in the garage or in Venette's office in the warehouse, for the drivers to ascertain their runs for the following day. If a driver had left for the day before the dispatch sheet was posted the driver was notified by phone of his next day's work.

In the morning the drivers reported to Clinton's Ditch, picked up their bills of lading and other paperwork, and departed on their runs. Venette attached a yellow slip of paper to the driver's bill of lading, giving the details of backhauls. Apart from driving, drivers regularly moved empty trailers to the loading dock and moved trailers to the Thruway compound.

The product itself was loaded onto the trailers by forklift operators supervised by Venette. As mentioned previously, Venette directly dispatched, handled driver discipline and otherwise had overall supervisory responsibility for transporation. In this regard drivers regularly contacted Venette when dispatch and transportation problems arose.

If drivers had hours[1] left after returning from a run, they picked up bills of ladings and took second trips. Second trips often were not listed on the dispatch sheet.

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[1]By law drivers may not drive more than ten hours a day or work more than fifteen hours total a day or work more than sixty hours a week.

## *ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983*

### Trivet House Meeting

On September 2, 1975, Shop Steward George Andrews, along with Union officers Paul Gambacordo and John Del Guidice at the invitation of Clinton's Ditch met with Woodruff and Venette at a luncheon meeting at the Trivet House. At this meeting Woodruff informed Local 317 that Fairfield was taking over the trucking operations for Clinton's Ditch but that nothing would change, that the Ditch would supervise everything, that all actions taken by Fairfield, including the negotiation of a contract, would have to be approved by Clinton's Ditch, and that if things did not work out, Clinton's Ditch would buy the equipment back and the drivers would be reemployed directly by Clinton's Ditch. Woodruff explained that the change was being made as a first step in Clinton's Ditch owning its own trucks.[2] Gambacordo died prior to the hearing in this case and obviously could not be a witness. Del Guidice, as a result of several medical problems at or about the time of the meeting, had no recollection of what had occurred at the meeting when he testified at the hearing. While driver and Union Steward George Andrews was incorrect as to exactly who attended the meeting, I credit his testimony that he was told by Clinton's Ditch that no substantive changes would occur when Fairfield came into the picture.

### Fairfield's Assumption of Transportation

In January 1976 Fairfield purchased the equipment, used by Clinton's Ditch, from Ryder and leased the equipment back to

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[2]Three drivers were informed by Clinton's Ditch prior to the takeover by Fairfield that the arrangement with Fairfield would not effect them. Woodruff told driver James Revior that nothing would change, that it was the beginning of Clinton's Ditch owning its own fleet and that he would always have a job. Driver Donald Stuper was told by Venette that under the change everything would go on the same as it always did. Venette told driver Lynne Root that the operation would be the same, but that the pay would come from Fairfield.

Clinton's Ditch on the same basis as Ryder had. At that time Fairfield replaced Ryder insofar as the maintenance of the equipment[3] was concerned.

On May 17, 1976, Clinton's Ditch and Fairfield entered into a carrier agreement. The carrier agreement provded for Fairfield to assume the Local 317-Clinton's Ditch collective bargaining agreement and for Fairfield to provide a written release from the Union to Clinton's Ditch from the labor agreement. A written release was never obtained. In fact, Mr. Quinn, counsel for Clinton's Ditch, suggested a three party agreement between Clinton's Ditch, Fairfield, and Local 317 be entered into so that Clinton's Ditch could be relieved of their obligations to Local 317 and the drivers it represented. No such three party agreement was entered into and, in fact, counsel for Local 317 made it crystal clear that it would continue to look to Clinton's Ditch as the ultimate employer.

The carrier agreement, because of delays in securing ICC and DOT approval, did not go into effect until September 20, 1976, at which time without any hiatus in transportation operations Fairfield took on Clinton's Ditch's drivers and assumed the Local 317 — Clinton's Ditch collective bargaining agreement.[4]

The carrier agreement and its successors entered into between Clinton's Ditch and Fairfield were terminable by either party upon specified notice, required Clinton's Ditch to purchase Fairfield's equipment upon termination and provided for periodic bargaining

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[3]Fairfield maintained the equipment at the Ditch's garage paying a dollar a year garage rental. The equipment retained the logo of Clinton's Ditch on the trucks and Pepsi logos on the trailers.

[4]Many of the drivers refused to fill out new job applications, as requested by Fairfield, and were not disciplined for failing to do so.

for rate adjustments. Compensation was based on flat rate per case and a flat fee for backhauls. Periodically compensation was increased partially based on labor figures submitted to Clinton's Ditch in justifieation by Fairfield. Under the carrier agreement, before Fairfield. periodically replaced equipment, the approval of Clinton's Ditch as to specifications of the purchase was required.

Prior to the actual loading of a trailer by Clinton's Ditch, Fairfield had no knowledge of the product or the weight of the trailer. In loading trailers Clinton's Ditch attempted to get the maximum payload. Similarly, inasmuch as Fairfield's compensation was based on a per case basis, Fairfield had no idea of its compensation for a run prior to loading by Clinton's Ditch. In this regard due to bulk and weight factors Fairfield's compensation varied depending on whether the trailer was loaded with cans or bottles. Moreover, wear and tear on Fairfield's equipment varied depending on the weight of the product carried. Fairfield had no ability under the carrier agreement to vary those factors, which influenced the profitability of its operations. Similarly, inasmuch as Fairfield was required to take whatever loads given to them and deliver the loads as dictated by Clinton's Ditch and as Fairfield was not informed of its work on other than a day before basis, Fairfield was without any power to efficiently schedule work to avoid utilizing extra men or renting extra equipment or to vary weight and deliveries to minimize wear and tear on equipment or to otherwise schedule deliveries in a manner they might have demmed more effecient.

Under the carrier agreement Fairfield was required to transport or pick up materials at the destination, date and time specified by Clinton's Ditch. Fairfield has no discretion or imput to deviate from the above conditions. Fairfield was informed of its work on a daily basis for the next days runs or, as often was the case, Fairfield was directed to perform the work as it arose. Drivers were assigned runs on the basis of seniority. The assignments themselves did not constitute much more than a ministerial act on Fairfield's part,

inasmuch as several of the runs would not be run as tandems because of the lack of proximity to the Thruway, driving time and geography. Tandems could be used for only certain locations based on consideration of geography, and backhauls were tied in to proximity to the place of delivery.

Transportation Under Fairfield

Dispatching of drivers and day-to-day operations remained substantially the same under Fairfield as it had under Clinton's Ditch. In this regard Fairfield never instructed the drivers as to how to perform their day-to-day work. The drivers merely continued operating as they had pre-Fairfield.

For at least a two month period from September 20, 1976, the date when Fairfield assumed the driving operations, Venette trained Fairfield dispatcher Horton. Venette met with Horton on a daily basis and showed him how the dispatch sheet was to be made up and how runs and backhauls were to be made. Venette advised Horton of what single runs to use, what tandem combinations to use and what times particular coop members were to receive deliveries. During this break-in period, Venette approved or disapproved the combinations proposed by Horton. When Venette disapproved of a combination and suggested a change Horton followed Venette's suggested changes. Venette similarly trained the Fairfield dispatchers who succeeded Horton. At some point after Fairfield was in place Venette told the Fairfield dispatcher that he (the dispatcher) should be aware of what time the drivers actually departed so that when a coop member called Venette to find out why a delivery was not made Venette could respond. Thereafter, Fairfield changed its operations so that it recorded the driver's actual departing time.

On a daily basis Venette continued to receive shipping tickets for the next day's deliveries. Venette would thereafter prepare a list of destinations, delivery time and backhauls which he presented to the

Fairfield dispatcher. As discussed, *supra*, Venette, until he was satisfied that the dispatcher could assign the work correctly, directly supervised the dispatchers in preparing the dispatch sheet. Following the training period, Venette regularly worked with the dispatcher in preparing the sheet. Runs continued to be assigned on the basis of seniority. Often Venette added runs or made changes to the assignment sheets after the dispatcher had departed for the day and at other times. As had been the previous practice, Venette added a slip to the bills of lading, which continued to be prepared by Clinton's Ditch, either specifiying the product to be picked up for delivery (backhauls) or a slip for the driver to call when he arrived at the destination for further assignment.[5] On occasion the dispatch sheet specified what driver should take a particular second run. Generally, however, drivers were not assigned specific second runs. Instead the driver took the most lucrative second run on the list on the dispatch sheet on a first-in, first-out basis in accordance with his hours remaining of driving time. Often drivers were assigned second or even third runs by Clinton's Ditch which were not listed on the dispatch sheet. In such circumstances the driver took the run without notifying the Fairfield dispatcher.[6]

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[5]The directive for a driver to call back was not listed on the dispatch sheet, only on the slip attached to the bills by Venette.

[6]Although Venette testified that he almost never made a change in runs affecting a driver unless he first cleared the change with the dispatcher, I find this statement to be less than totally credible given the limited hours, as discussed, *infra*, that the Fairfield dispatcher was on the premises and the fact that drivers were regularly making deliveries and returning to Clinton's Ditch almost on a twenty-four hour basis, and particularly at times when the dispatcher was gone during the work day. Accordingly, I do not credit Venette's testimony in this regard although I'm sure he kept the dispatcher informed as to what he was doing if the dispatcher were on the premises and it was convenient to do so. Moreover, as discussed, *infra*, the dispatcher did not often express surprise when a driver explained a delay in returning as scheduled by the fact that he had been contacted by Venette to do additional work. In this regard it is noted that driver Symer, when he regularly returned to the

On an average of once a week Venette added runs during the course of a day. On the same frequency Venette substituted runs for scheduled runs where Clinton's Ditch did not have the product for the original run.

Upon returning from runs Venette regularly directed drivers to take a load to East Syracuse.[7] The drivers took such runs without checking with Fairfield and were paid by Fairfield for the runs. Often the Syracuse runs were not listed on the dispatch sheet.

On one occasion in 1978 or 1979 driver Peck upon returning from a run, was asked by Venette to take a run to Auburn. Peck replied that he only had two hours driving time left and that the trip would take in excess of that time. Peck took the run, despite the obvious illegality of performing the work, after Venette told him that he had to take the load. Fairfield's dispatcher John Knatco was present during the conversation and did not countermand Venette's directive.

During the 1979 strike at coop member Syracuse Pepsi Cola, Venette directly supervised the drivers. Thus, on one occasion driver Paul Lee, after returning from his first run, went to the driver's room to pick up bills for a run to Auburn Pepsi. When he picked up the bills the dispatcher told him to see Venette. Lee reported to Venette who told him to take a load to the back of William's Market and that

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6. - continued -

facility, at 8:30 a.m., would observe Fairfield dispatcher Mosley going through the drivers' trip sheets and adding entries to the previous days' dispatch sheet to conform to the changes directed by Venette in the course of the day. Moreover, in the course of the conversation Mosley would note to Symer, in reviewing Symer's trip sheet, that he (Symer) had been given additional runs the previous day. I credit Symer's testimony in this regard.

[7]The East Syracuse facility of coop member Syracuse Pepsi was located approximately 15 minutes from the Ditch's facility.

a person from Syracuse Pepsi would meet him there and show him where to drop the trailer. Lee proceeded to William's Market but could not locate anyone from Syracuse Pepsi. Lee then called Clinton's Ditch in an attempt to reach Venette but Venette was out to lunch. Lee informed Clinton's Ditch why he was calling and was told that Clinton's Ditch would call over to Syracuse Pepsi to find out where the person was who Lee was to meet. A few minutes later Clinton's Ditch called Lee back and said that someone from Syracuse Pepsi was on his way. While waiting Lee saw a fellow driver and gave him the bills for the Auburn run to take back to the garage since he would not be able to make the trip. A short time thereafter Venette came to the Market and asked Lee if anyone showed up yet. Lee replied that he hadn't seen anyone. Venette and Lee proceeded to look for a person from Syracuse Pepsi. Venette then went inside the Market and came out and directed Lee to drop the trailer. Lee then went back to the garage but lost the Auburn trip.

On another occasion during the Syracuse strike driver Symer returned from a run but could not find the dispatcher. He went to Clinton's Ditch to get the bills for a Syracuse run and met Venette who told him that the bill was made out to Syracuse Pepsi but that he should park the trailer at a grocery store off of Midler Avenue and that he should see the store manager.

At any given time Fairfield employed but one dispatcher. The hours of the dispatcher varied. Dispatchers Horton and Knatco during their tenures worked from approximately 7 a.m. to 4:30 p.m. Mosley during most of his tenure worked slightly longer hours. However, during the last two months Mosley rarely was at the premises for more than two to three hours a day. The dispatchers prior to Mosley were regularly absent from the facility between the hours of 10 a.m. and noon. In addition, the dispatchers were regularly absent from the facility each Monday morning. Drivers left the facility anytime from 2 a.m. to 6 p.m., with the bulk of the runs starting at 4 a.m. Drivers regularly arrived at their destinations and were back to Clinton's Ditch from first runs at times when the

dispatcher was off the premises. Generally no other Fairfield employee other than a driver and dispatcher would be at the premises before 2:45 a.m. It is not surprising in light of this absence of Fairfield representatives that the drivers often contacted Clinton's Ditch when problems arose.

The Fairfield drivers were under direct instructions to call Clinton's Ditch if they had problems in the field with the product, delivery or pickup. Fairfield was called only if the driver encountered mechnical difficulties with the vehicles. In addition, drivers were instructed by Clinton's Ditch to contact it for authorization before taking product back from a customer. At a time approximately four to six months after the drivers went on the Fairfield payroll Clinton's Ditch imposed a practice, for the most part honored, of refusing to accept collect phone calls from the drivers. The drivers continued to contact Clinton's Ditch either by calling collect, having the coop member dial Clinton's Ditch, or calling Clinton's Ditch but billing the call to Fairfield.

As discussed, *supra*, often notes were attached to the bills of lading directing the driver to contact Clinton's Ditch when they arrived at a destination. The driver upon arriving at the destination would call Clinton's Ditch for instruction as to what they were to do next.[8] Generally the instructions invovled additional work, resulting in added compensation.

Drivers regularly contacted Venette or other Clinton's Ditch representatives when they encountered difficulties ranging from wrong product, refusal of a customer to accept load, damaged product, delay in pickup or delivery, errors in the bills of lading,

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[8]Venette conceded that pursuant to "call back" slips he was contacted by drivers once or twice a month and that he handled the call, often without informing the dispatcher.

customer requests for return of product, product unavailability and instructions as to care of product. Venette's instructions to the drivers would range from arranging for the product to be delivered elsewhere, return of the product to Clinton's Ditch, additional pickups, substitution of pickups, or arranging for the member to accept the load. Depending on Venette's instructions the drivers compensation could be increased or the driver would encounter substantial down time for which he was not compensated.

Venette's activities in resolving driving difficulties are illustrated by his intervention with American Can.

In early 1980 driver Albert Peck encountered a problem in picking up empty cans at the American Can facility in Fairport, New York. The problem was that other customers of American Can were receiving priority in pickup thereby causing Peck to have to remain at the facility until the other customers were loaded.[9] Upon returning to the Clinton's Ditch facility Peck sought out Venette and related the problem. Venette responded that Peck should contact him if he encountered loading problems in the future at Fairport. Thereafter, on at least two occasions Peck called Venette while at Fairport to complain that he was being delayed.[10] Following each call Venette resolved the delay and Peck was placed ahead of other trucks at Fairport.

Upon arriving at their dispatched destinations drivers were regularly contacted by phone by Venette and instructed by him to make an additional stop. At other times, rather than direct telephone

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[9]By encountering delays at Fairport, Peak lost driving hours which he could have utilized for other paid runs.

[10]Driver Boots similarly called Venette in August of September 1980 when he was delayed at Fairport. Venette told Boots to call back in 30 minutes if he wasn't loaded in that time. Venette thereafter intervened and Boots' trailer was loaded.

contact with the driver, Venette left messages with the place of destination relating the additional change.[11] The changes in the run were additions to the original assignments. Inasmuch as they were under instructions by Fairfield to conform to Venette's directive, the drivers did not clear Venette's instruction with Fairfield. As is apparent from the fact that drivers were often questioned by the Fairfield dispatcher as to why they were delayed in returning and were not disciplined when they reponded that Venette had made a change, it is clear that Venette's changes were made in many cases without the prior knowledge of Fairfield.

Often notes were attached by Venette to the bill of lading instructing the driver to pick up a check (C.O.D. delivery) at a customer's location. At some locations the customers, without any prior notification to the driver, gave the driver a check to return to Clinton's Ditch. When a driver was instructed to make the delivery COD and the check was not presented upon arrival the driver called Venette for instructions as to whether to make the delivery.

Venette regularly went to the Fairfield garage to pick up shipping tickets[12] and checks (COD's). At times Venette questioned the dispatcher as to why he hadn't separated the shipping tickets and returned the checks to him (Venette). On occasion Venette, himself, would perform Fairfield's work by separating the shipping tickets.

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[11]Venette testified that prior to contacting a driver to add a run he would first clear the additional work with the dispatcher. Mosley testified that when Venette contacted him regarding having a driver deviate from an original assignment he would tell Venette to leave word at the point of destination for the driver to make the change and that the driver would not call him (Mosley) back for confirmation of the directive related by Venette.

[12]Upon completing a run drivers would turn in their shipping tickets to Fairfield. Fairfield retained one copy of the tickets and Clinton's Ditch was given a copy.

## *ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983*

As part of their normal duties, drivers, without receiving extra pay, upon returning from a run took their empty trailers to Clinton's Ditch's loading dock and backed the trailer to the dock if a space was available. Throughout the course of their employment with Fairfield, drivers regularly pulled loaded trailers from the dock and moved empty trailers from the yard to the dock for loading. This movement of trailers was referred to as "spotting." The drivers were paid extra per spot by Fairfield.

The drivers were under standing order from Fairfield to perform whatever work, inclduing spotting, requested by representatives of Clinton's Ditch. Drivers were regularly directed by representatives of Clinton's Ditch, primarily Venette, to spot trailers. The drivers followed such directives without clearing the directive with Fairfield, were paid by Fairfield for such work, and were not questioned or disciplined for following the directives of Clinton's Ditch to spot.[13]

Although the drivers spotted throughout the year, most of the spotting work took place during the winter months when Fairfield did not employ a yardman to perform spotting. Inasmuch as a driver would have no way of knowing what trailers had been loaded or were ready for loading spotting did not take place unless the driver was specifically directed to pull a specified trailer. The principle procedure for spotting was for Venette[14] to stop a driver and direct him to spot a particular trailer or trailers. Often Venette handed the driver a list of trailers to be spotted.

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[13]The drivers had regularly spotted under the directive of Venette prior to the arrival of Fairfield in September 1976.

[14]Depending on the time of year and the time they came back from runs drivers would perform spotting work anywhere from a couple of times a week to a couple times a month. Although the Fairfield dispatcher and employees of the Ditch would on occasion request drivers to spot, the majority of the directives to spot were made by Venette.

In addition to spotting at Clinton's Ditch's facility, the drivers regularly spotted at coop members. This circumstance occurred if a trailer was already in the member's loading dock. In these cases the coop member directed the Fairfield driver to move the trailer. Procedurally the driver unhooked his trailer, pulled the trailer to be moved with his tractor and then rehooked the Fairfield trailer to the tractor for backing into the loading dock. The drivers were paid extra for this work by Fairfield and performed such work without clearance or questioning by Fairfield.[15]

In late 1977 and early 1978 Union President Thomas Hall met with representatives of Fairfield to negotiate a labor agreement to succeed the Local 317-Clinton's Ditch agreement which had been adopted by Fairfield. Bargaining was frustrated by the fact that Fairfield, prior to making any committments with the Union concerning monetary increases, had to check with Clinton's Ditch as to whether it could meet the requested increases. Apart from monetary items, Fairfield informed the Union that Clinton's Ditch wanted specific language in the contract to insure that the Union would not honor a picket line in the event the Steelworkers struck. Ultimately language was reached protecting Clinton's Ditch. Throughout the course of the negotiations, Clinton's Ditch, through written correspondence from Fairfield, was informed of the status of negotiations. I specifically credit the testimony of Tom Hall regarding these negotiating sessions.

While employed directly by Clinton's Ditch the drivers, in addition to the compensation specified in the labor agreement, received two cases of low fill sodas a week, a Thanksgiving turkey and were invited

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[15]The drivers were similarly paid for such spotting when employed directly by Clinton's Ditch.

to Clinton's Ditch annual clambake.[16] Throughout the course of their direct employment by Fairfield Clinton's Ditch continued to provide drivers with turkeys, weekly low fills and a clambake.[17]

By memorandum dated September 24, 1976, Woodruff informed the coop members as follows:

> TO: ALL MEMBERS
> CLINTON'S DITCH COOP. CO., INC.
>
> RE: *FAIRFIELD TRANSPORTATION*
>
> Effective Monday, September 20, 1976, we transferred our drivers over to Fairfield Transportation. As of that date the drivers became employees of Fairfield. Some are bitter but they will adjust to the new employers in a short period of time. If you have any problems with any one of these drivers please contact me.
>
> Now that the change has taken place, it is even more important that at NO TIME you send back more than 75 pallets on any truck. Would you kindly see to it that each truck gets some pallets but no more than 75.
>
> Have a Pepsi Day.
>
> Alan

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[16] In 1973 prior to the entry of Fairfield on the scene the Union won an arbitration award reinstating the weekly low fills following the unilateral cessation of the practice by Clinton's Ditch.

[17] Although Fairfield became the direct employer of the drivers on September 20, 1976, Clinton's Ditch paid for the vacation that was taken by drivers during the period September 20, 1976 through December 31, 1976.

Woodruff testified that pursuant to the memorandum members of the coop contacted him with problems they had encountered with drivers and that he forwarded the complaints to Fairfield. The second portion of the memorandum directing members not to return more than 75 pallets with a driver, relates to the fact that Clinton's Ditch paid Fairfield for a pickup if drivers returned more than 75 pallets. Woodruff testified that the purpose of the directive was to avoid Clinton's Ditch becoming obligated for a pickup.

By memorandum dated June 6, 1977, Woodruff informed coop members as follows.

> TO: ALL MEMBERS
> CLINTON'S DITCH COOP. CO., INC.
>
> RE: NEW DRIVERS
>
> Due to the large volume of sales, our trucker, Fairfield Transportation, has hired several new drivers. So, I thought this would be an appropriate time to advise you as to the responsibilities of each driver – old and new.
>
> 1. He should arrive at your plant at the approximate time you requested.
>
> 2. He is responsible to get the pallets of full product to the tailgate by use of a hand-jack. You are not required to supply any assistance, but you may.
>
> 3. He should bring back two stacks of empty pallets and please remember - no more than 90 as I have to pay for more than 90.
>
> 4. Any foul or abusive language should be reported to either Bob Vinette or myself for appropriate disciplinary action.

5. No driver is authorized to make settlements for damaged products. Contact Bob Vinette or myself in this case.

If you have any problems or questions please contact me.

As discussed *supra*, Clinton's Ditch directed its members to contact it if they had complaints about the drivers. Upon receiving complaints Clinton's Ditch notified Fairfield and expected Fairfield[18] to act upon such complaints, including taking appropriate disciplinary action. As attested by Venette, Fairfield met Clinton's Ditch's expectations in following through on imposing discipline. Venette explained that it was his policy to complain about drivers by first verbally discussing the matter with the Fairfield dispatcher and thereafter, if necessary, lodging a written complaint. Venette explained, that if he lodged a written complaint Fairfield would generally give him a written response and that in such cases the complained of conduct did not repeat itself. The above described procedure was in effect throughout the course of Clinton's Ditch's relationship with Fairfield. Set forth below, in chronological order, are the complaints representatives of Clinton's Ditch recalled lodging with Fairfield.

On June 6, 1977, Woodruff wrote Fairfield's dispatcher Horton relating that he had a call from an individual who claimed that a driver had used foul language. Woodruff advised Horton that he should tell the drivers that even though they work for Fairfield that Clinton's Ditch name and the name of Pepsi Cola is on the vehicle. Woodruff concluded by suggesting that Horton "straighten out a couple of immature drivers that you have on your payroll."

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[18]Fairfield dispatcher, Mosley testified that when he received complaints about a driver from Clinton's Ditch or a member he would investigate, take appropriate action and advise the caller of his action.

Woodruff explained that he wrote the letter after receiving a complaint about driver George Andrews. Thereafter Andrews received a written warning over this alleged incident, with a copy of the warning letter going to Woodruff.[19]

By letter, dated March 4, 1977, Andrews received a written warning from Horton for terminating his daily run at his home. Andrews met with Horton and explained that he was not taking the vehicle home and that he had only been using a different Thruway exit to avoid traffic. Horton said that he had received his information from Venette. Andrews then talked to Venette and explained as he had to Horton. Venette told him not to worry that it was only a warning notice and that they assumed he was taking off because he had gotten off a different exit than that used by the other drivers.

By letter dated November 12, 1976, with a copy sent to Venette, driver Fred Hassney received a written warning from Fairfield for refusing a Syracuse run given to him by Venette. The letter states:

> Failure to comply with the above outlined procedure, or to cooperate with officials of Clinton's Ditch or Fairfield Trans. Corp. will result in further disciplinary action in the form of suspension or if continued, possible dismissal.

Thereafter, Andrews, Horton, Venette and Hassney met to discuss the letter. Venette and Horton took the position that Hassney had been goofing off while Andrews and Hassney replied that Hassney had already worked a 14 hour day.

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[19]After returning from the run where the incident occurred Andrews was questioned by Venette as to whether he had a run in with somebody.

## *ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983*

By letter dated June 23, 1977, Venette wrote Horton that coop member Buffalo Pepsi had complained about driver Dale Reynolds using pallets to position his load. Thereafter, by letter, dated June 27, 1977, with copies to Woodruff and Venette, Horton issued a written warning to Reynolds. Andrews discussed the unloading problem with Venette and Venette suggested that junk pallets be used in the future.

On February 20, 1978, Woodruff wrote Horton to complain about Reynolds and concluded by stating that he "strongly suggest[s] that you do not send this man to the Buffalo plant any longer." Woodruff testified that by sending the letter he expected Fairfield not to send Reynolds any longer to Buffalo. In fact, thereafter, following a meeting with Andrews, Horton and Reynolds, Reynolds was no longer sent to Buffalo.

By letter dated August 31, 1977, Venette wrote Horton complaining about Andrews damaging product in running to Keesville. Thereafter, by letter, dated September 6, 1977, with a copy to Venette, Horton issued a written warning to Andrews. Andrews went directly to Venette and hold him that the problem was caused by the manner in which Clinton's Ditch was loading the product and questioned how could he be responsible in such circumstances. Venette replied, "Don't worry about it, it's just a warning letter."

By letter dated February 20, 1978, Woodruff complained again to Horton about damaged products on Keesville runs caused by the negligence of Andrews.

By letter dated January 14, 1978, Venette wrote Horton to complain about driver Walter Watkins' failure to make a pickup. Venette concluded his letter by stating:

> Jim, I would appreciate a written reply, at your earliest convenience explaining how and why this

> situation happened and the appropriate reprimand action taken with this driver.

Venette elaborated that he was thereafter informed by Horton that Watkins had claimed he was sick and therefore left the load. Venette testified that he accepted Horton's explanation.

In January 1977 Venette and Woodruff along with Fairfield participated in a meeting at the Union's hall concerning the discharge of driver Root. At this meeting Venette stated that they were better off without Root. Ultimately it was agreed to reinstate Root.

Periodically Clinton's Ditch sent memoranda to Fairfield instructing Fairfield to take certain actions with respect to the drivers. Woodruff acknowledged that he expected Fairfield to carry through with his memoranda and that Fairfield did, in fact, conform to the requested actions. In this regard Mosley testified that it was his practice to take a copy of the memorandum from Clinton's Ditch, make a handwritten notation on it calling the drivers' attention to the memo, and post the memorandum on the drivers' bulletin board. Mosley testified that he expected the drivers to conform with Woodruff's memoranda.

On May 5, 1980, Woodruff wrote Mosley complaining that a loaded trailer had not been placed back to back so as to prevent theft and that Pepsi trailers had not been placed at the entrance to the driveway of Clinton's Ditch for advertising purposes.[20] Following receipt of the memo Mosley took steps to ensure that the matters were taken care of.

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[20]Once the product was loaded on the trailers Fairfield was responsible for the product.

*ADMINISTRATIVE LAW JUDGE'S DECISION*
*DATED JANUARY 5, 1983*

By letter dated July 21, 1980 Woodruff wrote Mosley:

> Please advise all of your drivers that they are not authorized to bring back any product from Member plants without a return authorization slip or verbal approval from either Mr. Davies, Mr. Venette or myself.

In addition to the above, Mosley recalled posting memoranda from Clinton's Ditch directing drivers to check trailer wheels when they backed empty trailers to the Clinton's Ditch loading dock and not to drop loaded trailers on the black top in front of the plant.

Clinton's Ditch had sole responsibility for loading product on the Fairfield trailers and for determining the method to secure the product on the trailer. In 1979 Clinton's Ditch utilized iron grates to hold pallets in place. The grates caused damage to drivers' clothing during the unloading process. When the Union complained to Fairfield about the use of grates Fairfield responded that it was Clinton's Ditch's problem. After unsuccessfully attempting to contact Clinton's Ditch, the Union filed an OSHA complaint which resulted in Clinton's Ditch abandoning the use of the grates.

By letter, dated July 29, 1980, Fairfield, following a breakdown in negotiations with Clinton's Ditch for a rate increase, sent Clinton's Ditch a notice of termination effective October 31, 1980. As discussed previously, in the negotiations Fairfield had submitted documents which, *inter alia*, set forth labor costs, as justification for the increase. Following receipt of the cancellation notice, Woodruff commenced contacting other companies to make arggangements for transportation. At no point did Clinton's Ditch inform the Union of the cancellation notice or thereafter contact the Union in any manner. By letter dated October 24, 1980, Woodruff informed Fairfield that pursuant to its obligations under the carrier agreement to buy back Fairfield's equipment, Ryder would purchase the

tractors and Lincoln Leaseway would purchase the trailers. Thereafter, the equipment was purchased and Ryder and Leaseway, in turn, leased the equipment back to Clinton's Ditch. This equipment, which had been used by Fairfield, continued to be marked with the Clinton's Ditch logo.

By letter, dated October 16, 1980, Fairfield informed the Union that effective on October 31, 1980, all bargaining unit members would be permanently laid off.[21] Upon receipt of the letter Union President Hall, confronted Fred Durkin, Fairfield's President and asked him what was going on. Durkin told him that the matter was out of his (Durkin's) hands and that Hall should talk to Clinton's Ditch. After unsuccessfully attempting to reach Woodruff by phone, Hall went to the Cicero facility and demanded from Woodruff that he be kept informed about what was going on so that he could protect the employees' rights. Woodruff responded that he had asked Durkin for a thirty day extension, that Durkin had not granted it, and that Hall should deal with Durkin. After speaking with Woodruff, Hall again met with Durkin who told Hall that he was "washing his hands, it's between you and Clinton's Ditch."

By telegram, dated October 30, 1980, the Union requested a meeting with Clinton's Ditch to discuss the termination of the Local 317 drivers. Clinton's Ditch made no response to the Union's demand. This was at a minimum the functional equivalent of a demand to bargain made by Local 317 to Clinton's Ditch.

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[21] Fairfield, prior to the October 16, 1980, letter never informed the Union of the uncertainty of the continuation of a relationship with Clinton's Ditch or requested bargaining with the Union to effectuate a reduction in the monetary package so as to enable it to make a better proposal to Clinton's Ditch.

## *ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983*

### Fairfields' Existence

Fairfield was formed for the sole purpose of servicing Clinton's Ditch and at no time serviced anyone but Clinton's Ditch. As of October 31, 1980, following the implementation of the buy-back agreement with Clinton's Ditch, Fairfield had no trailers, tractors, assets, employees or existence.[22]

### Global Leasing

As discussed *supra*, following receipt of the cancellation notice from Fairfield, Woodruff began seeking alternative means of transportation. On August 25, 1980, Woodruff met with Jack Bevans of Global Leasing, Inc., hereafter "Global." On August 26, 1980, Bevans sent Woodruff a written proposal which stated in part:

> As I told you in my conversation while in Syracuse, I recommend that these drivers be put under a union contract with the Brotherhood of Railway & Airline Clerks. I believe that Local 317 will do all in their

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[22]Mosley credibly testified that the *modus operandi* of Fred Durkin is to form a separate corporation to service a particular client. When the agreement with the client is terminated the trucking company is dissolved. Each Durkin corporation is separately incorporated, maintains separate tax records, and individually engages in collective bargaining. The collective bargaining agreements provide for separate seniority lists and separate health and welfare contributions. In this regard Mosley testified that Durkin takes steps to ensure the separate identity of the various corporations. On occasion when Fairfield needed extra equipment or extra drivers it would rent equipment from a Durkin or other company and ask a Durkin or other company if they had men who were available. The extra men, so acquired, received the terms and conditions of the Fairfield-Local 317 agreement. In this regard a man employed by a Durkin company could not be ordered to work elsewhere. The singleness of the Fairfield operation is further illustrated by the fact that the Fairfield drivers who obtained employment with other Durkin companies had to apply as new applicants and did not retain or carry over any seniority or benefits accrued with Fairfield. In sum, the record is inescapable that Fairfield vis-a-vis other Durkin entities constituted a single employer under the Act. Fred Durkin did not testify.

> power to organize this operation as they will be losing this membership. Any rates that I am quoting to you I am sure that I will be able to negotiate with BRAC, but I do not want to contact the Union until such time as we know that this is the way it is going to go.

Sometime prior to October 14, 1980, Woodruff told Bevans to prepare to supply drivers as of November 1, 1981.[23] On October 23, 1981, the Clinton's Ditch Board of Directors approved entering into an agreement with Global to replace Fairfield.

Thereafter Clinton's Ditch and Global entered into an agreement, dated October 29, 1980.[24] Interestingly enough the agreement contains numerous provisions indicative of joint employer status, e.g., Article 3 provides that Clinton's Ditch can cause the discharge of Global drivers, Article 7 provides that Global will assume no responsibility for compliance with ICC or DOT rules relating to personnel, Article 8 provides that Clinton's Ditch shall have the right to examine Global's personnel records, Article 9 provides that Clinton's Ditch will do all dispatching and all day-to-day operations of the vehicles, Article 18 provides that Clinton's Ditch will not violate any collective-bargaining agreements entered into by Global and that Clinton's Ditch will indemify Global for any monetary awards arising under the labor agreements of Global.[25]

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[23]Woodruff contended that the agreement was in effect on a temporary basis between October 1980 and April 1981.

[24]Clinton's Ditch gave no notice to the Union as to its intent to enter into an agreement with Global.

[25]Woodruff contended that prior to signing he informed Bevans that any agreement he signed was subject to the approval of his attorney. The October 29, 1980, agreement, as acknowledged by Woodruff, contains no such reservation. Respondent contends that the October 29 agreement was never enforced as to those items indicating joint employer status and there is no evidence that it was and that in

Without any hiatus in delivery operations, Global replaced Fairfield on November 1, 1980. Global did not retain any of the Fairfield drivers but utilized a similar complement of men. Global utilized the equipment leased to Clinton's Ditch.[26] Clinton's Ditch had input into the selection of the Global dispatcher. Venette, as he had for Fairfield, spent a two month period breaking in the Global dispatcher, teaching the Global dispatcher the procedures for dispatching runs and backhauls. In all respects, including dispatching, runs, loading, daily assignments, and backhauls, Global's operations have remained identical to Fairfield's.[27]

Discussion

It is uncontested that up to September 20, 1976, Clinton's Ditch was the employer of its drivers who were represented by Local 317 of the Teamsters. As such Clinton's Ditch had certain obligations toward those drivers with respect to bargaining, etc. On September 20, 1976, Clinton's Ditch's drivers went onto the payroll of Fairfield. Fairfield adopted the collective bargaining agreement between Clinton's Ditch and Local 317 and when that agreement expired in 1978 Fairfield entered into a separate collective bargaining agreement with Local 317. On October 31, 1980, the drivers covered by the collective bargaining agreement between Fairfield and Local 317 were terminated, when Clinton's Ditch and Fairfield terminated their relationship and Clinton's Ditch thereafter subcontracted its delivery functions to Global Leasing, which delivery functions had

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25. - continued -

April 1981 a new agreement was entered into between Global and Clinton's Ditch, which does not contain the aforesaid clauses indicative of joint employer status.

[26]Sometime in December 1981 or January 1982 Global took over maintenance responsibilities from Ryder. At about the same time Clinton's Ditch purchased the trailers and tractors it had leased.

[27]Global's compensation is based on a cost plus basis, i.e. direct operating costs, including the costs of the dispatcher, plus a flat fee.

been unit work of its drivers/employees at least up to September 20, 1976. The actions of Union President Tom Hall discussed *supra*, in talking with Durkin and Woodruff about the termination of the drivers and sending the October 30, 1980, telegram to Woodruff clearly constitute attempts to bargain over the termination of the drivers and its effects. If Clinton's Ditch continued to be an employer of the drivers represented by Local 317 after September 20, 1976, and up to October 31, 1980, then Clinton's Ditch violated Sections 8 (a) (1) and 8 (a) (5) of the Act when it unilaterally subcontracted the unit work to Global Leasing without first honoring Local 317's request to bargain. The subcontracting effectively breached the collective bargaining agreement then in effect between Local 317 and Fairfield. The remedy would be to return to the *status quo ante*, i.e., reinstatement with backpay to the terminated drivers and an order to Clinton's Ditch to bargain in good faith with Local 317 regarding the subcontracting of the unit work. If Clinton's Ditch was not an employer of the drivers represented by Local 317 on October 31, 1980, then the Complaint in this matter should be dismissed. Clinton's Ditch could only be an employer of the drivers represented by Local 317 as of October 31, 1980, if Clinton's Ditch was a joint employer of those drivers along with Fairfield.

There are numerous reported cases wherein the Board has discussed whether or not an entity is or is not a joint employer with another. Several tests have evolved for determining joint employer status. The Board generally looks to four principal factors in determining whether two arguably separate employers are really joint employers. These factors are: (1) common ownership or financial control, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. *L.E. Davis, d/b/a Holiday Inn of Benton*, 237 NLRB 1042. All four factors need not be present and centralized control of labor relations has been held to be the most significant factor. *Floyd Epperson & United Dairy Farmers, Inc.*, 202 NLRB 23, enf'd, 491 F.2d 1390 (6th Cir. 1974).

Clearly, Clinton's Ditch and Fairfield do not have common officers, common management officials, or common financial control. Accordingly, they are not a single employer or joint employer based on the theory of common financial control, common management or common officers. However, on the basis that there was such an interrelation or integaration of opreations between the two and such other evidence pointing to joint employer status I conclude that Clinton's Ditch and Fairfield were joint employers. They shared or co-determined matters governing the essential terms and conditions of employment of the drivers.

Counsel for the General Counsel, Respondent, and Charging Party have cited virtually all the leading cases on the question of joint employer status. No one case cited by any of them is exactly on all fours with the instant case. Each case can be distinquished on its facts from the instant case, however, an analysis of those cases and the factors that those cases hold to be indicative of joint employer status lead to the inescapable conclusion that Clinton's Ditch was a joint employer with Fairfield.

Those factors which in the aggregate lead to the conclusion that Clinton's Ditch was a joint employer with Fairfield can be summarized as follows:

1. Integration or interrelationship of operations. See, e.g., *Land Equipment, Inc.*, 248 NLRB 685. Fairfield did not exist except to service the need of Clinton's Ditch to deliver its product. Venette and whoever the Fairfield dispatcher was at the time worked hand in glove on a daily basis to accomplish the task of deliverying Clinton's Ditch's product. Fairfield could not even purchase trucks without the approval of Clinton's Ditch. See, *Berkshire Concrete Corp.*, 278 NLRB 1658. The drivers on the Fairfield payroll drove trucks with the Clinton's Ditch logo on them. See, *Sinclair and Valentine Co., Inc.*, 238 NLRB 754; *Browning - Ferris Industries, Inc.*, 259 NLRB No. 21.

2. Participation in collective bargaining process. Tom Hall credibly testified that during the negotiating between Local 317, which he represented, and Fairfield that the Fairfield representatives continually had to consult with Clinton's Ditch. See, *The Pulitzer Publishing Co.*, 242 NLRB 35, *American Air Filter Co.*, 258 NLRB No. 10, *U.S. Pipe and Foundry and Winfrey Enterprises, Inc.*, 247 NLRB 139.

3. Day-to-day supervision of work. Even acknowledging that some of the drivers exaggerated the numbers of times that Venette contacted them in the field or that they contacted Venette while they were in the field it is still crystal clear that as a practical matter the entry of Fairfield on the scene only introduced one supervisory level individual between the drivers and Venette, namely, the Fairfield dispatcher. For all practical purposes the drivers continued to Venette's men. See, *Moderate Income Management Co., Inc.*, 256 NLRB No. 179, *The Pulitzer Publishing, Co.*, 242 NLRB 35, *Syufy Enterprises*, 220 NLRB 738. Possibly the case with the greatest factual similarity to the instant case is *Floyd Epperson and United Dairy Farmers, Inc.*, 202 NLRB 23 *enf'd*, 491 F.2d 1390 (6th Cir. 1974). The Board found joint employer status in that case on facts substantially similar to those in the instant case, United was found to be a joint employer with Floyd Epperson where the drivers, who were obstensibly employed by Floyd Epperson but hauled for United, were directed in the field by United supervisors not unlike the way in which Venette directed the drivers in this case who were obstensibly employed by Fairfield.

4. Control of wages, hours and other terms of employment. Joint employer status has been based on the implementation, direct or indirect, of discipline. See, e.g., *Syufy Enterprises, supra* and *Floyd Epperson, supra.* In the instant case Clinton's Ditch effectively disciplined drivers and directed other terms and conditions of their employment by issuing directions on a wide range of subjects. The drivers often received orders directly from Clinton's Ditch regarding spotting and taking second runs which directly affected their wages.

Some factors which would point to joint employer status are not present in this case, e.g., it appears that hiring and firing was done by Fairfield, Fairfield maintained records of drivers' hours required by the ICC and DOT and Fairfield handled the payroll for the drivers to include paying social security and withholding taxes. However, the presence in this case of so many of the factors which point to joint employer status in the cases cited by the parties leads to the conclusion that Clinton's Ditch and Fairfield were joint employers on October 31, 1980.

Two additional points should be noted: (1) Local 317 in September, 1976, in a letter to Clinton's Ditch from Local 317's attorney (a letter Clinton's Ditch never responded to) clearly put Clinton's Ditch on notice that it was *not* releasing it from its collective bargaining obligations to Local 317 and advising further that Local 317 would continue to look to Clinton's Ditch and (2) Clinton's Ditch, through its agents, led the drivers represented by Local 317 to believe that the entry of Fairfield would only result in a change of the name on their paychecks, thereby lulling the drivers into a sense of security, which proved to be false in October 1980. I conclude that the case of *American Pacific Concrete Pipe Co., Inc.*, 262 NLRB No. 139, cited in the Charging Party's reply brief, is not controlling in this case. There was no contract between Clinton's Ditch and Local 317 because there was no meeting of the minds between the parties that Clinton's Ditch would rehire the drivers as their direct employees if Fairfield went out of business. However, Clinton's Ditch clearly left the impression that this would be the case. Accordingly, it would be unjust for Clinton's Ditch in light of all the foregoing to be found anything other than a joint employer.

The telegram of October 30, 1980, from Hall to Clinton's Ditch can only be interpreted as a timely request to bargain in light of the history of the relationship between Local 317, Farifield, and Clinton's Ditch and in light of the manner in which Hall was told by Fred Durkin two weeks prior to sending the telegram that the closing of

Fairfield was out of his hands and he should talk to Alan Woodruff and when Hall spoke with Woodruff, Woodruff told him the matter was out of his hands see and he should talk to Durkin.

The contracting out of the work previously performed by members of an existing bargaining unit is a subject of mandatory collective bargaining, *Fibreboard Paper Products* v. *NLRB*, 379 US 203 (1964). Accordingly, Clinton's Ditch, which refused to bargain about this matter with Local 317, but unilaterally brought in Global Leasing to perform the unit work of delivering its product violated Sections 8 (a) (1) and 8 (a) (5) of the Act. *First National Maintenance Corp.* v. *NLRB*, 101 S. Ct. 2573 (1981), relied on by Clinton's Ditch, is not controlling. When Fairfield terminated its very existence the only remaining parties to the existing employer - employee relationship were Clinton's Ditch and the drivers represented by Local 317. While a management decision to terminate a part of its operation for economic reasons may not be a subject of mandatory collective bargaining Clinton's Ditch in the instant case was continuing the delivery portion of its operation only its delivery of product to its coop members would be done by drivers working for Global Leasing and not by the drivers represented by Local 317. This contracting out is clearly a mandatory subject of bargaining.

In light of the violations of Sections 8 (a) (1) and 8 (a) (5) the only remedy available is to return to the *status quo ante* insofar as possible, i.e., the drivers should be reinstated with backpay, Clinton's Ditch directed to cease and desist in its unlawful practices and to bargain in good faith with Local 317. See *Hillside Manor Health Related Facility*, 257 NLRB 981, *Capital Parcel Delivery Co.*, 256 NLRB 302. Respondent points out that this usual Board remedy will cause problems for Clinton's Ditch. This is true and regrettable but the necessary consequence of violating the law.

## *ADMINISTRATIVE LAW JUDGE'S DECISION DATED JANUARY 5, 1983*

### Conclusions of Law

1. Respondent is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Sections 2 (2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By displacing the drivers represented by the Union, upon the expiration of its contract with Fairfield Transportation without permitting the Union to bargain over the decisions or its effects on these employees, Respondent engaged in unfair labor practices within the meaning of Section 8 (a) (1) and 8 (a) (5) of the Act.[28]

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

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[28] I do not conclude that Respondent violated 8 (d) of the Act because Clinton's Ditch was not a signatory to the existing collective bargaining agreement between Fairfield and Local 317 and it was Fairfield who elected to terminate the existing carrier agreement between it and Clinton's Ditch in accord with the provisions of that agreement. The purposes of the Act will be accomplished if the drivers are reinstated with backpay and both sides commence to bargain in good faith regarding a new contract between them.

*ADMINISTRATIVE LAW JUDGE'S DECISION*
*DATED JANUARY 5, 1983*

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER[29]

Respondent, Clinton's Ditch Cooperative Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its truck drivers who work at its Cicero, New York, facility by contracting out the work of those employees or otherwise changing their wages, hours and other terms and conditions of employment without first bargaining with the above labor organization.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights udner Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Reinstate and make whole those employees displaced by the termination of the carrier agreement between Respondent and

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[29]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 120.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Fairfield Transportation Corp. tor any loss of pay and other benefits suffered by them commencing on November 1, 1980. Backpay to be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289, with interest as set forth in *Florida Steel Corporation*, 231 NLRB No. 117 (see, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716).

(b) Bargain collectively with Local 317 as the exclusive representative of the above described employees with respect to wages, hours and other terms and conditions of employment.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilty in Cicero, New York, copies of the attached notice marked "Appendix."[30] Copies of this notice on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[30]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. January 5, 1983

MARTIN J. LINSKY
Martin J. Linsky
Administrative Law Judge

*ADMINISTRATIVE LAW JUDGE'S DECISION*
*DATED JANUARY 5, 1983*

**APPENDIX**

# NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE**
**NATIONAL LABOR RELATIONS BOARD**
**AN AGENCY OF THE**
**UNITED STATES GOVERNMENT**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all truck drivers who work out of our Cicero, New York, facility by contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the abovenamed labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them under Section 7 of the Act.

*ADMINISTRATIVE LAW JUDGE'S DECISION*
*DATED JANUARY 5, 1983*

WE WILL offer reinstatement to all the drivers displaced by the termination of the carrier agreement between us and Fairfield Transportation Corp. in October 1980.

WE WILL give all driver-employees who were displaced by the termination of our carrier agreement with Fairfield Transportation Corp. in October 1980 backpay with interest.

WE WILL bargain collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the drivers who work out of our Cicero, New York, facility

CLINTON'S DITCH COOPERATIVE COMPANY, INC.

(Employer)

Dated _____ By _____
*(Representative)* *(Title)*

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

**This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office: 111 - West Huron Street, Federal Building - Room 901; Buffalo, New York 14202, Tel. No. (716) 846-4951**

## STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157, provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

Section 8 (a) (1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (a) (1) and (5), provides that:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

## *STATUTORY PROVISIONS INVOLVED*

Section 8 (d) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (d), provides that:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification -
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in

subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in

> such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 10 (e) of the National Labor Relations Act, as amended, 29 U.S.C. §160 (e), provides that:

> The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of the extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

**AGREEMENT BETWEEN CLINTON'S DITCH COOP CO., INC. and GLOBAL LEASING DATED OCTOBER 29, 1980**

AGREEMENT

THIS AGREEMENT made and entered into by and between GLOBAL LEASING, INC. whose address is Colts Towne Shopping Center, Highway 34, Colts Neck, New Jersey 07722 hereinafter referred to as "Lessor" and *Clinton's Ditch Coop. Co., Inc.* whose address for purpose of this Agreement is *P.O. Box G, Cicero, New York 13039* hereinafter referred to as "Lessee" on this *29th* day of *October 1980.*

WITNESSETH:

WHEREAS, Lessee, within the scope of and in furtherance of its nontransportation primary business conducts a private carriage operation for the purpose of delivering its own products to its customers or of picking up materials belonging to it for delivery to its own plants; and

WHEREAS, Lessee, either owns or leases the vehicles used to implement this private carriage operation; and

WHEREAS, Lessor, is desirous of supplying personnel who are employees of Lessor, to Lessee which it may utilize in furtherance of its private carriage operation;

IT IS AGREED BY THE LESSOR:

1. As needed by Lessee, Lessor will provide Lessee with competent, experienced and duly licensed drivers and personnel who are legally qualified under all state and federal regulations to drive vehicles owned or leased by Lessee in intra and interstate commerce.

2. All such personnel supplied by Lessor will be bonded in the amount of $100,000 in conformity with Lessor's standard fidelity and bond policy, which policy Lessor convenants shall remain in full force and effect throughout the life of the Agreement.

3. Lessor will terminate the assignment of any personnel supplied by Lessor to Lessee if Lessee finds that (a) such personnel conduct themselves in such a way as to result in an increased premium on any insurance policy or policies carried by Lessee, or (b) such personnel are not competent, or (c) such personnel are not or fail to continue to be duly licensed, or (d) such personnel's health is at any time less than required for the work involved.

4. Lessor will pay the personnel wages and provide any of the benefits required by any applicable bargaining agreement between Lessor and any authorized representative of any collective bargaining unit which may be in effect from time to time and will pay all applicable federal and state taxes with respect to the employment of such personnel including social security, federal and/or state unemployment compensation taxes. Lessor further will maintain payroll records and reports and carry workers' compensation insurance on all personnel and will comply with all applicable laws and regulations of all govermental agencies relative to the employment of such personnel.

5. Lessor has procured and will continue to maintain in full force and effect during the life of this Agreement liability insurance for bodily injury and property damage on an occurence basis, covering its employees while such employees are (a) not actually engaged in the operation of Lessee's vehicles, or (b) driving such vehicles without Lessee's permission express or implied and not in furtherance of the work

contemplated hereunder, whether such vehicles are owned or leased. Lessor represents and warrants to Lessee that the aforesaid insurance coverage has and will continue during the life of this Agreement to provide liability limits of at least $250,000 for bodily injury to any one person and $500,000 for bodily injury for any one occurrence and $100,000 property damage in any one occurrence. Upon request, Lessor will furnish certificate(s) of insurance evidencing its obligations as provided in this paragraph.

6. Lessor agrees to be responsible for the workers' compensation insurance on its employees. If any direct claim for workers' compensation benefits or awards is asserted against Lessee by any of said employees or, in the event of death, by their personal representive(s), then Lessor shall idemnify and hold Lessee harmless from and against any such claim(s) to the extent of all benefits and awards, cost of litigation, disbursements and reasonable attorney's fees Lessee may incur in connection therewith. At Lessee's option, and upon written notice, Lessor will undertake to defend workers' compensation insurance with a reputable insurance company, covering the aforesaid obligations. Upon request, Lessor will furnish certificate(s) of insurance evidencing its obligations as provided in this paragraph.

7. Lessor will assume no responsibility for the personnel's compliance with the the Interstate Commerce Commission and/or Department of Transportation Hours of Service and other safety regulations or for any similiar state regulations.

8. Lessee shall have the right, upon demand, at all times during regular business hours to examine and inspect Lessor's personnel records.

*AGREEMENT BETWEEN CLINTON'S DITCH COOP. CO., INC. and GLOBAL LEASING DATED OCTOBER 29, 1980*

IS AGREED BY LESSEE:

9. Lessee will dispatch, direct the loading and unloading of vehicles, select routes, direct personnel as to pick-ups, deliveries and other matters related to the day-to-day operation of the vehicles utilized by Lessee.

10. Lessee will obtain and maintain reports, records and other data necessary to comply with the applicable regulations of the Interstate Commerce Commission and Department of Transportation and of such other applicable State and Federal agencies in connection with the operation of vehicles in Lessee's private carriage system, and Lessee shall further assume all responsibility to periodically check personnel's logs and other required reports and records to assure compliance with all applicable Federal and State governmental regulations. Lessor shall have the right to inspect the foregoing during Lessee's regular business hours and Lessee will make copies thereof available to Lessor upon request. Lessee agrees to idemnify and hold Lessor harmless for any loss or expense which Lessor may incur by reason of any non-compliance or violation of such regulations by Lessee.

11. Lessee will not hold Lessor responsible for loss or damage to the vehicles being operated by personnel furnished by Lessor or for loss or damage to any cargo carried by any said vehicles by reason of fire, collision, or other casualty, or by reason of theft, unless such theft is participated in directly or indirectly by Lessor's employee and unless Lessor is advised of such theft within seven (7) days of the discovery thereof by Lessee.

12. With respect to the vehicles used pursuant to this Agreement, Lessee will procure and maintain in full force and effect throughout the life of this Agreement an insurance policy with a reputable company, with the coverages and limits set forth hereafter naming as an additional insured Lessor and/or its officers and employees; the coverage to include bodily injury and property damage on an occurrence basis, comprehensive and collision or upset damage. The limit of liability for the bodily injury and property damage coverage shall be at least $500,000 bodily injury for each person, $500,000 bodily injury for each occurrence, and $500,000 property damage for each occurrence. Upon request, Lessee will furnish certificate(s) of insurance evidencing its obligations as provided in this paragraph which certificate(s) shall provide for at least thirty (30) days' mail notice to Lessor of either cancellation or reduction in limits of Lessee's insurance coverage as set forth herein.

13. Lessee shall not hold Lessor responsible or liable for failure to provide personnel as requested if prevented by war, labor dispute, fires, Acts of God, accidents or any other causes beyond the control of the Lessor.

14. Lessee will pay Lessor for services provided in accordance with the schedule or amendments thereto attached to this contract.

15. Lessee, in calculating the mileage for which Lessee is obligated to pay Lessor under the terms of this Agreement, shall be governed by the distance of mileage shown on the Hubometer of the truck making such trips. Verification of each trip will be checked against mileages indicated on the current Mileage Guide published by the Household Goods Carriers' Bureau Agent and approved supplements thereof.

Any discrepencies shall be reconciled by mutual agreement prior to payments of the invoices.

16. Lessee will pay to Lessor all charges provided herein within a reasonable period of time after being received by Lessee. Such payments shall be made at least twice monthly and shall cover all invoices prior to the date of payment.

17. Lessee will not make any request or demand upon Lessor, nor shall Lessor have the right, to make any contact, enter into any contract or arrangement, set up any type of coordinated or concerted operation, or otherwise engage in any activity with any third party truck leasing firm, either as Lessee's agent or independently, it being expressly recognized that to do so may jeopardize the private carriage status of Lessee. In the event that Lessee leases vehicles to implement its private carriage operation, all such contacts, contracts, arrangements and activities shall be made and entered into directly by Lessee, without reference to Lessor in any way.

GENERAL PROVISIONS

18. Lessor will have sole control and responsibility for and will be sole signatory under and connected with all labor negotiations, grievances, collective bargaining agreements and related items concerning personnel furnished to Lessee under this Agreement. Lessee agrees not to violate the terms of any collective bargaining agreement which Lessor may sign with respect to the personnel hereunder. Lessee agrees to idemnify Lessor at Lessor's cost both direct and indirect without any service charge for any payments Lessor may make to personnel for services not actually performed as a result of any determination or settlement of a claim arising out of any collective bargaining agreement Lessor may have

covering such personnel or any action instituted by a governmental agency relative to such personnel.

19. This Agreement shall be the entire understanding and Agreement between Lessor and Lessee with regard to the subject matter hereof, and any representations, covenants, terms and conditions not incorporated herein shall not be binding on either party. Specifically, should Lessee subsequently issue its standard Purchase Order in connection with this Agreement, and indemnification and/or insurance clause contained in the General Terms and Conditions of any such Purchase Order shall not apply to the performance of this Agreement. It is understood that this Agreement applies only to the Lessee's plant(s) located at the address indicated on schedule(s) attached hereto and made a part of this Agreement and shall not apply to or bind any other organizational components of Lessee or affect in any way any other organizational component. This Agreement shall supersede all prior understandings, agreements, contracts or arrangements between Lessee and Lessor. This Agreement may be amended or changed only by the execution of an endorsement or amendment hereto duly executed by both Lessor and Lessee.

20. The Agreement shall be binding upon the parties hereto, their successors, legal representative and assigns, but no assignments of this Agreement or any interest herein by either party shall be valid without the prior written consent of the other party, except that invoices rendered hereof by Lessor to Lessee may be assigned at Lessor's discretion to any legally licensed bank, trust company, savings or other lending institution.

*AGREEMENT BETWEEN CLINTON'S DITCH COOP. CO., INC. and GLOBAL LEASING DATED OCTOBER 29, 1980*

21. The term of this Agreement shall be indefinite and shall run until cancelled by either party upon thirty (30) written days' notice prior to the proposed effective date of termination. Such notice shall be deemed given when mailed by certified mail postage prepaid, to the address appearing above in this Agreement and a copy of said cancellation notice mailed to Colonial First National Bank, 303 Broad Street, Red Bank, New Jersey 07701.

IN WITNESS WHEREOF, the parties have executed this Agreement each by any officer duly authorized, as of the date above set forth.

*Clinton's Ditch Corp. Co., Inc.*
LESSEE

BY: *ALAN WOODRUFF*
*Alan Woodruff*

TITLE: *General Manager*

GLOBAL LEASING, INC.
LESSOR

BY: *JOHN J. BEVAN*

TITLE: *President*

## LETTER FROM GLOBAL LEASING TO CLINTON'S DITCH COOP. CO., INC. DATED AUGUST 26, 1980

*Global Leasing, Inc.*

August 26, 1980

Mr. Alan Woodruff
General Manager
Clinton's Ditch
Cooperative Company, Inc.
Box G
Cicero, New York 13038

Dear Mr. Woodruff,

I want to thank you for your hospitality while I was in Syracuse, New York and we are very much appreciative for the opportunity to present this quote.

Global Leasing, Inc. is prepared to provide drivers for your operation.

Our General Liability and Bonding coverage would provide your company with $100,000.00 of protection against possible loss by collusion of our drivers and $500,000.00 of protection for unauthorized use of equipment.

We would screen and test drivers and offer employees to you who meet all State and Federal requirements. They would be considered our employees but would be under your exclusive control and direction, just as if they were directly employed by you.

Our office in Colts Neck, New Jersey would handle all matters pertaining to payroll, including reports to all appropriate State and Federal Agencies for taxes and insurance. Additionally, our extensive background can provide assistance and

recommendations, if needed, for improved efficiencies of your private carriage operation. We firmly believe we can offer your company with the most comprehensive driver leasing services available.

The burden rates for your operation are as follows and passed on to you at cost:

New York

6.13% F.I.C.A. on all earnings to $25,900.00
0.70% Federal Unemployment to $6,000.00
2.70% State Unemployment to $6,000.00
5.67% Worker's Compensation on all earnings
1.00% Liability & Bonding on all earnings
0.19% State Disability

Global Leasing's Service Charge would be $25.00 per week per employee.

The worker's compensation for a dispatcher is much lower than that of a driver. I will obtain that rate as soon as possible.

As I told you in my conservation while in Syracuse, I recommend that these drivers be put under a union contract with the Brotherhood of Railway & Airline Clerks. I believe that Local 317 will do all in their power to organize this operation as they will be losing this membership. Any rates that I am quoting you I am sure that I will be able to negotiate with BRAC, but I do not want to contact the union until such time as we know that this is the way it is going to go.

I am going to recommend two different ways of paying the drivers, which are the two ways we talked about while I was there.

*LETTER FROM GLOBAL LEASING TO CLINTON'S DITCH COOP. CO., INC. DATED AUGUST 26, 1980*

Plan I

1) A weekly salary of $400.00
2) 3½¢ per mile for all miles driven
3) A flat ½ hour for each trailer that has to be hooked up or dropped and this includes the equipment check
4) Casual drivers shall receive $350.00 per week for the first thirty (30) days of employment
5) Lay-overs - the drivers shall be paid for motel rooms only
6) Funeral Leave - employees shall be allowed three days to attend the funeral in the event of the death of a mother, father, sister, brother, wife or children. In the event that the death falls on a weekend or holiday he shall be guaranteed two days
7) Health & Hospital - this cost shall average out to $87.00 per month per employee
8) Pension - an I.R.A. of $14.00 per week per employee
10) Holidays - shall be at the rate of $60.00 per holiday, if worked, and there shall be nine holidays

Plan II

1) Mileage rate-20¢ per mile for doubles; 19¢ per mile for singles
2) Hourly rate of $6.50 per hour
3) A flat ½ hour for each trailer that has to be hooked up or dropped and this includes the equipment check
4) Drivers shall be paid for motel rooms when required to layover
5) Funeral Leave-employees shall be allowed three days to attend the funeral in the event of the

*LETTER FROM GLOBAL LEASING TO CLINTON'S DITCH COOP. CO., INC. DATED AUGUST 26, 1980*

death of a mother, father, sister, brother, wife or children. In the event that the death falls on a weekend or holiday he shall be guaranteed two days. The rate to be $52.00 per day

6) Health & Hospital-this cost shall average out to $87.00 per month per employee
7) Pension-an I.R.A. of $14.00 per week per employee
8) Holidays-shall be at the rate of $52.00 per holiday, if worked, and there shall be nine holidays

Alan, I believe that under Plan I we would be able to get excellent drivers and I believe that these drivers would work out to your company's total satisfaction with a minimum amount of problems.

If you have any questions on this quotation, please do not hesitate to contact me.

Very truly yours,

GLOBAL LEASING, INC.

*John J. Bevan*
John J. Bevan
President

JJB:dk

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1743

# In the Supreme Court of the United States

OCTOBER TERM, 1985

TEAMSTERS LOCAL 317, PETITIONER

*v.*

CLINTON'S DITCH COOPERATIVE CO., INC. AND NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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*Department of Justice*
*Washington, D.C. 20530*
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ROSEMARY M. COLLYER
*General Counsel*
*National Labor Relations Board*
*Washington, D.C. 20570*

8 pp

**TABLE OF AUTHORITIES**

Page

Cases:

*Ace-Alkire Freight Lines, Inc.* v. *NLRB*, 431 F.2d 280 ..... 4

*Boire* v. *Greyhound Corp.*, 376 U.S. 473 ..... 4

*Carrier Corp.* v. *NLRB*, 768 F.2d 778 ..... 4

*Industrial Personnel Corp.* v. *NLRB*, 657 F.2d 226, cert. denied, 454 U.S. 1148 ..... 4

*International Chemical Workers Union Local 483* v. *NLRB*, 561 F.2d 253 ..... 4

*NLRB* v. *Browning-Ferris Industries, Inc.*, 691 F.2d 1117 ..... 4

*NLRB* v. *C.R. Adams Trucking, Inc.*, 718 F.2d 869 ..... 4

*NLRB* v. *Jewell Smokeless Coal Corp.*, 435 F.2d 1270 ..... 4

*Pulitzer Publishing Co.* v. *NLRB*, 618 F.2d 1275, cert. denied, 449 U.S. 875 ..... 4

*Ref-Chem Co.* v. *NLRB*, 418 F.2d 127 ..... 4

*Sun-Maid Growers* v. *NLRB*, 618 F.2d 56 ..... 4

*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 ..... 4

Page

Statute and rule:

National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.* ..... 1

§ 8(a)(1), 29 U.S.C. 158(a)(1) ..... 2

§ 8(a)(5), 29 U.S.C. 158(a)(5) ..... 2, 3

§ 8(d), 29 U.S.C. 158(d) ..... 3

Sup. Ct. R. 17.1 ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1743

TEAMSTERS LOCAL 317, PETITIONER

*v.*

CLINTON'S DITCH COOPERATIVE CO., INC. AND NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner challenges the court of appeals' conclusion that the National Labor Relations Board erred in finding that respondent Clinton's Ditch Cooperative Co. was a "joint employer" for purposes of the National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*

1. Clinton's Ditch Cooperative Co. (Clinton) is a soft drink bottler and distributor. Until 1976, Clinton directly employed truck drivers represented by petitioner Local 317 to deliver its products (Pet. App. A32-A33). In 1976, Clinton subcontracted its delivery operation to Fairfield Transportation Corp. (Fairfield). Fairfield hired Clinton's complement of drivers and assumed Clinton's responsibilities under the collective bargaining agreement with petitioner (*id.* at A35-A36). The delivery operation did not change substantially after the subcontract to Fairfield. The drivers served the same customers out of the same garage with the same trucks (*id.* at A38).

In 1978, petitioner negotiated a new collective bargaining agreement with Fairfield. During negotiations, Fairfield asserted that it could not enter into a binding agreement without clearing it with Clinton (Pet. App. A46, A60). However, only Fairfield signed the new agreement with petitioner (*id.* at A57).

Following unsuccessful negotiations over a rate increase in its subcontract with Clinton, Fairfield sent Clinton a termination notice effective October 31, 1980 (Pet. App. A53). Clinton then entered into a new subcontract with Global Leasing, Inc. (Global), which hired a new complement of drivers (*id.* at A55-A57). Clinton refused to bargain with petitioner concerning its decision to subcontract its delivery operation to Global (*id.* at A54). Petitioner then filed an unfair labor practice charge with the Board alleging that Clinton had unlawfully subcontracted its trucking operation to Global.

2. The Board found that Clinton and Fairfield were joint employers of the drivers who made deliveries for Clinton and that Clinton violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), when, after its contract with Fairfield was scheduled to terminate, it subcontracted its trucking operation to Global without bargaining with petitioner concerning the subcontracting decision (Pet. App. A24). Affirming the administrative law judge's findings of fact, the Board concluded that Clinton and Fairfield "shared or codetermined matters governing the essential terms and conditions of employment of the drivers" (*id.* at A22 n.3).[1] The Board ordered

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[1]The ALJ had found that, after entering into the Fairfield subcontract, Clinton continued to be involved in collective bargaining negotiations and active supervision of the drivers. He also found that "Clinton's Ditch effectively disciplined drivers * * * [and gave them] orders * * * which directly affected their wages" (Pet. App. A60). The Board did not rely on his discussion of "other factors that are relevant only in the single employer context" (*id.* at A22 n.3).

Clinton, inter alia, to offer reinstatement to the displaced drivers, make them whole, and bargain with petitioner (*id.* at A26, A64-A65).[2]

The court of appeals denied enforcement of the Board's order, concluding that "there is insufficient evidence to support the [B]oard's determination that Clinton's Ditch and Fairfield were joint employers of the drivers" (Pet. App. A20).[3] The court stated (*id.* at A19):

> This is not a case in which Clinton's Ditch merely leased drivers from Fairfield and then treated them as its own employees. Rather, it was Fairfield or its dispatchers that: hired and fired drivers; disciplined drivers; handled drivers' records, payrolls, and taxes; supervised drivers in their day-to-day work; and bargained collectively with the drivers' union. Clinton's Ditch did not participate in hiring and firing, and had only an indirect, limited connection to problems of pay, discipline, or any other aspect of labor relations.

3. The petition presents the question whether the court of appeals erred in rejecting the Board's finding that Clinton and Fairfield were joint employers.[4] The Board believes

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[2]Member Hunter would have additionally found that Clinton was bound to the collective bargaining agreement between Fairfield and Local 317 and that its failure to apply that agreement violated Section 8(a)(5) and (d) of the Act (29 U.S.C. 158(a)(5) and (d)). See Pet. App. A22-A23 n.3.

[3]Accordingly, the court did not consider whether petitioner had waived its right to bargain or whether ~~the~~ Clinton's subcontracting decision was a mandatory subject of bargaining (see Pet. App. A11).

[4]The second question raised by petitioner (Pet. i, 16-19)—whether the court of appeals erred in finding a waiver of petitioner's right to bargain—was not directly decided by the court of appeals. The court's discussion of the impact of petitioner's failure to insist that Clinton sign petitioner's collective bargaining agreement with Fairfield (see Pet. App. A17-A18, A19) was addressed largely to whether Clinton and Fairfield were joint employers, not to the separate issue whether petitioner had waived its collective bargaining rights.

that the court of appeals should have affirmed its joint employer finding. The Board, however, did not file a petition for a writ of certiorari because, in its view, there are no special or important reasons for this Court's review. See Sup. Ct. R. 17.1. The dispute here turns on the particular facts of this case. Accordingly, the decision below is not one that this Court ordinarily would review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).[5]

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[5]Whether or not a company possesses "sufficient indicia of control to be an 'employer' is essentially a factual issue * * *" (*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)). While the various circuits may state the standard somewhat differently, all agree that the nature and extent of control over the employees' working conditions is determinative. Thus, all of the cases cited by petitioner (Pet. 11-12 n.2) where joint employer status was found involve evidence of substantial control over working conditions that the Second Circuit concluded was lacking here. See *Carrier Corp.* v. *NLRB,* 768 F.2d 778, 781 (6th Cir. 1985) (day to day supervision of drivers); *NLRB* v. *Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1124-1125 (3d Cir. 1982) (same); *Sun-Maid Growers* v. *NLRB,* 618 F.2d 56, 59 (9th Cir. 1980) (assigned work and controlled scheduling); *NLRB* v. *Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1272 (4th Cir. 1970) (de facto control over the employees); *Ref-Chem Co.* v. *NLRB,* 418 F.2d 127, 129 (5th Cir. 1969) (co-determination of essential terms of employment). In *International Chemical Workers Union Local 483* v. *NLRB,* 561 F.2d 253, 256-257 (D.C. Cir. 1977), the court upheld the Board's finding of no joint employer status because the company in question did not direct the employees in "the details" of their work. Finally, while the Eighth Circuit in *Pulitzer Publishing Co.* v. *NLRB,* 618 F.2d 1275, 1278-1279, cert. denied, 449 U.S. 875 (1980), did apply a four-factor test to a joint employer determination, that court has subsequently indicated that "control over the employment conditions" is the critical factor. *NLRB* v. *C.R. Adams Trucking, Inc.*, 718 F.2d 869, 870 (8th Cir. 1983). See also *Industrial Personnel Corp.* v. *NLRB,* 657 F.2d 226, 229 (8th Cir. 1981), cert. denied, 454 U.S. 1148 (1982); *Ace-Alkire Freight Lines, Inc.* v. *NLRB,* 431 F.2d 280, 282 (8th Cir. 1970).

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

ROSEMARY M. COLLYER
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*National Labor Relations Board*

JUNE 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1743

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

TEAMSTERS, LOCAL 317,

*Petitioner,*

—v.—

CLINTON'S DITCH COOPERATIVE CO., INC., and
NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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(212) 687-7410
*Attorneys for Respondent*
*Clinton's Ditch Cooperative, Inc.*

*Of Counsel:*
THOMAS W. BUDD*
RICHARD K. MUSER

*Counsel of Record

## QUESTIONS PRESENTED

1. Whether the Court of Appeals created a standard for determining joint employer status which conflicts with the decision of another federal Court of Appeals?
2. Whether the Court of Appeals correctly applied the substantial evidence standard in vacating the National Labor Relations Board's decision that Clinton's Ditch Cooperative Co., Inc. was a joint employer of drivers represented by Teamsters Local 317?
3. Whether the question raised by Petitioner regarding the enforceability of an alleged oral agreement between the parties should be considered by this Court?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED ..... | i |
| TABLE OF AUTHORITIES ..... | iii |
| STATEMENT ..... | 1 |
| SUMMARY ..... | 3 |
| COUNTERSTATEMENT OF FACTS ..... | 6 |
| REASONS FOR DENYING THE WRIT ... | 13 |
| I. THE COURT OF APPEALS DID NOT RENDER A DECISION ON THE PROPER STANDARD FOR DETERMINING JOINT EMPLOYER STATUS WHICH CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT ..... | 13 |
| II. THE COURT OF APPEALS CORRECTLY DECIDED THAT SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S DECISION THAT CLINTON'S DITCH WAS A JOINT EMPLOYER OF THE DRIVERS ..... | 18 |
| III. PETITIONER'S ARGUMENT THAT RESPONDENT VIOLATED SECTION 8(d) OF THE ACT BY REFUSING TO GIVE EFFECT TO AN ALLEGED ORAL AGREEMENT BETWEEN THE TWO PARTIES IS NOT PROPERLY BEFORE THIS COURT ..... | 25 |
| CONCLUSION ..... | 28 |

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Boire v. Greyhound Corp., 376 U.S. 473 (1964) ..... | 15, 18 |
| Ellis v. Dixon, 349 U.S. 458 (1955), rehearing denied, 350 U.S. 855 (1955) ..... | 27 |
| International Chemical Workers Union Local 483 v. N.L.R.B., 561 F.2d 253 (D.C. Cir. 1977) ... | 16 |
| International House v. N.L.R.B., 676 F.2d 906 (2d Cir. 1982) ..... | 14,15, 18 |
| Industrial Personnel Corp. v. N.L.R.B., 657 F.2d 226 (8th Cir. 1981), cert. denied, 454 U.S. 1148 (1982) ..... | 14 |
| N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3d Cir. 1982) ... | 16 |
| N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F.2d 1270 (4th Cir. 1970) ..... | 16 |
| Pulitzer Publishing Co. v. N.L.R.B., 618 F.2d 1275 (8th Cir. 1980), cert. denied, 449 U.S. 875 (1980) ..... | 14, 15 |
| Ref-Chem Company v. N.L.R.B., 418 F.2d 127 (5th Cir. 1969) ..... | 17 |
| Sun Maid Growers v. N.L.R.B., 618 F.2d 56 (9th Cir. 1980) ..... | 15 |

| | Page |
|---|---|
| United Automobile Workers v. Scofield, 382 U.S. 205 (1965) ..... | 26 |
| Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) ... | 24 |
| Statutes and Rules: | |
| National Labor Relations Act | 2 |
| 29 U.S.C. §158 ..... | 2,25 |
| 29 U.S.C. §160 ..... | 18 |
| 28 U.S.C. Rule 17 ..... | 3 |

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985
No. 85-1750

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TEAMSTERS LOCAL 317,

Petitioner,

v.

CLINTON'S DITCH COOPERATIVE CO., INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# BRIEF FOR RESPONDENT IN OPPOSITION

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## STATEMENT

On February 28, 1985 the National Labor Relations Board (the "Board") issued its decision and order in 274 NLRB No. 103. The Board found that Clinton's Ditch Cooperative Co., Inc. ("Clinton's Ditch" or "Respondent") was a joint employer of truck drivers with

Fairfield Transportation Corp. ("Fairfield") and that Clinton's Ditch had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. §158(a)(1) and (5), by failing to bargain with Teamsters Local 317 (the "Union" or "Petitioner") over Respondent's decision to subcontract its trucking operations. Clinton's Ditch petitioned the United States Court of Appeals for the Second Circuit for review on the basis that sufficient evidence did not support three of the Board's essential findings, viz., (1) Clinton's Ditch was a joint employer, (2) Clinton's Ditch failed to bargain with the Union over a mandatory subject of bargaining; i.e., subcontracting its trucking operations, (3) the Union had made a timely demand upon Respondent to bargain. On December 5, 1985, the Court of Appeals vacated the Board's order based only upon its holding

that there was insufficient evidence on the record to support the Board's determination that Clinton's Ditch was a joint employer of the truck drivers.

The Union, Intervenor below, seeks review of this decision. The Board, Respondent below, takes the position that this case is not appropriate for certiorari.

## SUMMARY

The petition for certiorari should be denied. The specific considerations governing a grant of certiorari set forth in Rule 17 are not present in this case, nor are there any "special and important reasons" for this Court to review the decision of the Court of Appeals. Petitioner's claim that the Second Circuit has developed a new standard for determining joint employer status that has contributed to a conflict among the circuits is incorrect. The

Court of Appeals neither developed a new joint employer test nor adopted a standard for determining joint employer status that was in conflict with the decision of another circuit. Instead, after carefully examining the facts of the instant case and the various joint employer standards espoused by the Board and the circuit courts, the Court of Appeals concluded that application of any test to the instant case would result in the determination that Clinton's Ditch was not a joint employer of the drivers. In sum, the Court of Appeals' holding was based solely on its determination that the evidence on the record did not sufficiently support the Board's finding that Clinton's Ditch was a joint employer. Petitioner can posit no compelling reason to warrant this Court's review of the Court of Appeals' decision that the facts

of this case did not support a finding that Clinton's Ditch was a joint employer.

There is nothing to support Petitioner's claim that the Court below misapplied the substantial evidence standard.

Petitioner's claim that the Second Circuit erred in finding a waiver of an alleged oral agreement between Petitioner and Clinton's Ditch is incorrect. The Court below, in agreement with the Administrative Law Judge and the Board, found no oral agreement. Furthermore, the issue of the oral agreement was not properly before the Court below and the portion of Petitioner's brief addressing that subject had been stricken by order of the Court. Therefore, the issue is not properly before this Court.

## COUNTERSTATEMENT OF THE FACTS

Clinton's Ditch is engaged in the business of bottling and canning Pepsi Cola and other beverage products at its plant in Cicero, New York. These products are then shipped primarily to other Pepsi Cola bottlers which are members of the Cooperative. Prior to January, 1976, the products were transported by employees of Clinton's Ditch in trucks leased from and maintained by Ryder Truck Rental ("Ryder"). The Clinton's Ditch drivers were represented by Petitioner. [Petitioner's Appendix at A-5, "Pet. App." herein].

On January 1, 1976, Fairfield purchased these trucks from Ryder and entered into a truck leasing agreement and maintenance contract with Clinton's Ditch. In May, 1976, Clinton's Ditch and Fairfield entered into a separate

agreement whereby Fairfield assumed Clinton's Ditch's obligations under its collective bargaining agreement with the Union which ran from February 2, 1976 until February 1, 1978. Clinton's Ditch notified the Union by letter on September 7, 1976 that "effective Monday, September 20, 1976, [Clinton's Ditch] will transfer our trucking over to [Fairfield] along with the collective bargaining agreement . . . . The drivers will be transferred to [Fairfield's] payroll on that date also." By letter dated September 9, Clinton's Ditch asked the Union to acknowledge Fairfield as the new employer of the drivers after the transfer of operations had taken place. In a letter four days later the Union responded by stating that it would refuse to recognize Fairfield as the drivers' employer. [Pet. App. A-6 to 7].

On September 20, the drivers were transferred to Fairfield's payroll. Clinton's Ditch did pay the drivers' vacation pay until the end of 1976 and continued to provide the drivers with a few nominal benefits (a Thanksgiving turkey, an annual clambake, and two cases of soda a week) throughout the period of its contract with Fairfield. Otherwise, Fairfield assumed all responsibility for the terms of the drivers' employment. [Pet. App. A-7].

While the drivers essentially performed the same functions as before, they were now under the supervision and control of the Fairfield dispatcher. Clinton's Ditch would prepare a list of pickups and deliveries and submit it to the Fairfield dispatcher who would assign the runs to the drivers. On occasion, Clinton's Ditch would alter a drivers assignment by directly contacting the

driver at one of his stops, ask drivers to move empty trailers around the Clinton's Ditch yard, or ask them to take runs not listed on the dispatch sheet. The drivers were under standing orders from Fairfield to honor such requests from Clinton's Ditch. [Pet. App. A-8].

Clinton's Ditch informed members of the Cooperative that the drivers were now employed by Fairfield, but that its members should contact Clinton's Ditch if they had any problems with the drivers. Several times, when members complained to Clinton's Ditch about the conduct of the drivers, Clinton's Ditch would forward these complaints to Fairfield. On occasion, these complaints would take the form of a written complaint or would be discussed with Fairfield. Fairfield would investigate the complaint and decide whether to institute disciplinary action. Oftentimes, but not always, Fairfield

would inform Clinton's Ditch of the action it had taken. Clinton's Ditch did not participate in grievance proceedings involving the Fairfield drivers. [Pet. App. A-8].

In late 1977 and early 1978, the Union and Fairfield met to negotiate a new collective bargaining agreement. Clinton's Ditch did not participate in the negotiations. Eventually Fairfield and Petitioner settled upon a new agreement that was to run to February, 1981. Clinton's Ditch was not a party to this agreement. [Pet. App. A-9].

Fairfield informed Clinton's Ditch on July 29, 1980 that it would terminate their truck leasing and maintenance contract on October 31, 1980 unless the parties could reach a new agreement on that date with a rate increase for Fairfield's services. Clinton's Ditch contacted other trucking

companies as possible replacements and in late August received a written proposal from Global Leasing, Inc. ("Global"). In early October Clinton's Ditch requested that Fairfield postpone the termination of the contract for thirty days. This request was refused by Fairfield. [Pet. App. A-9].

Fairfield informed the Union, by letter dated October 16, 1980, that all drivers would be permanently laid off on October 30. Hall, the Union president, approached Respondent's president Woodruff on this subject. Woodruff informed Hall that a thirty-day extension of the contract with Fairfield had been requested and denied, so Hall should speak to Fairfield. [Pet. App. A-9].

Thereafter, Clinton's Ditch informed Global to be ready to supply drivers on November 1. After Clinton's

proposal to replace Fairfield with Global, the two parties signed a contract on October 29, 1980. Fairfield sold its tractors to Ryder and its trailers to Lincoln Leaseway. These companies then leased this equipment to Clinton's Ditch for use by Global drivers. Initially, Global did not hire any of the drivers formerly employed by Fairfield. [Pet. App. A-9 to 10].

On October 30, 1980, the Union sent a telegram to Clinton's Ditch demanding that it bargain with the Union over its decision to retain Global as its trucking company. Thereafter, the Union initiated the present proceeding by filing charges against Clinton's Ditch at the National Labor Relations Board. [Pet. App. A-10 to 11].

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS DID NOT RENDER A DECISION ON THE PROPER STANDARD FOR DETERMINING JOINT EMPLOYER STATUS WHICH CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT.

The Petitioner argues that the issue presented by this case is an "important issue of federal labor law" which requires Supreme Court intervention. Petitioner also argues that the important issue has not been resolved below because the Court of Appeals has contributed to a conflict among the circuits by developing a new standard for determining joint employer status. Neither claim is accurate. As to the need for this Court to become involved in reviewing the purely factual issue of the joint employer status, it is sufficient to note that the position of the Board, the agency empowered to formulate this area of

federal labor policy, is that this case is not appropriate for certiorari. Furthermore, this Court has recently denied certiorari in two "joint employer" cases under the National Labor Relations Act. Pulitzer Publishing Co. v. N.L.R.B, 618 F.2d 1275 (8th Cir.), cert. denied, 449 U.S. 875 (1980); Industrial Personnel Corp. v. N.L.R.B, 657 F.2d 226 (8th Cir. 1981), cert. denied 454 U.S. 1148 (1982).

In response to the alleged conflict among the circuits, the Court of Appeals rendered its decision only after examining all the joint employer tests put forth by the Board and various circuits and deciding that under any standard the facts of this case did not support the Board's conclusion that Clinton's Ditch was a joint employer of the drivers.

In International House v. N.L.R.B., 676 F.2d 906 (2d Cir. 1982), the Second Circuit recognized that other

circuits had used various tests to determine whether an employer "'possessed sufficient control over the work of the employees to qualify as a joint employer.'" International House, 676 F.2d at 912; Boire v. Greyhound Corp., 376 U.S. 473, 482 (1964). At that time, the Court in International House noted that the Eighth Circuit in Pulitzer Publishing Co. v. N.L.R.B., 618 F.2d 1275, 1279 (8th Cir.), cert denied, 449 U.S. 875 (1980), examined four factors to determine joint employer status: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. The Ninth Circuit examined the Employers' "authority over employment conditions which are within the area of mandatory collective bargaining." Sun Maid Growers v. N.L.R.B., 618 F.2d 56, 59 (9th Cir. 1980). The D.C. Circuit looked to "the amount of actual and

potential control *** over the *** employees." International Chemical Workers Union Local 483 v. N.L.R.B., 561 F.2d 253, 255 (D.C. Cir. 1977).

Similarly, the Court of Appeals noted other tests that had been developed for determining joint employer status. So, for example, the Court noted that the Fourth Circuit, in N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970)(per curiam), had examined whether the employer "possessed sufficient indicia of control over the work of the employees," while the Third and Fifth Circuits used the same analysis employed by the Board in the instant case; i.e., whether the employer shared or co-determined matters governing the employees' essential terms and conditions of employment. N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1123

(3rd Cir. 1982); Ref-Chem Company v. N.L.R.B., 418 F.2d 127, 129 (5th Cir. 1969).

After examining the various standards for determining joint employer status, the Court concluded, as it had in International House, that there was "no need to select among these approaches or to devise an alternate test ....", [Pet. App. at A-14 quoting 676 F.2d at 913], because it found "that an essential element under any determination of joint employer status in a subcontracting context is lacking here - sufficient evidence of immediate control over the employees." [Pet. App. at A-14]. Based on its examination of the facts presented in the instant case, the Court of Appeals specifically declined to establish or adhere to a specific test for determining joint employer status. Therefore, the Court of Appeals did not render a decision

in conflict with the decision of another circuit court that would warrant this Court's review under Rule 17.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THAT SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S DECISION THAT CLINTON'S DITCH WAS A JOINT EMPLOYER OF THE DRIVERS.

As this Court found in Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), the question of whether an employer possesses sufficient control over the employees to qualify as a joint employer "is essentially a factual issue." The Board's determination of that issue will be conclusive only if it is "'supported by substantial evidence on the record considered as a whole'". International House v. N.L.R.B., 676 F.2d 906, 912 (2d Cir. 1982); (29 U.S.C. §160(e)). The Court of Appeals, in examining the essentially

undisputed facts of this case correctly found that they did not support the Board's conclusion that Clinton's Ditch was a joint employer of the drivers.

As stated previously, the Court of Appeals focused on the one essential element common to all joint employer tests, namely, sufficient evidence of immediate control over the employees. The Court employed five factors to determine if the evidence on the record supported a finding that Clinton's Ditch exercised sufficient immediate control over the drivers to warrant a conclusion that it was a joint employer. The five areas of control examined by the Court were: hiring and firing; discipline; pay, insurance and records; supervision; and participation in the collective bargaining process. Examining each of these areas of control separately, the Court found that the record evidence did not indicate that

Clinton's Ditch exercised sufficient control to warrant its being found a joint employer.

The Court noted that the Administrative Law Judge ("ALJ") had found that "it appears that hiring and firing was done by Fairfield." [Pet. App. at A-14, A-61]. In contrast to the ALJ's finding that Respondent "effectively disciplined drivers," [Pet. App. at A-60], the Court noted that there was no evidence that Clinton's Ditch was directly involved in any disciplinary action against the drivers. Indeed, the Court found that the complaints Clinton's Ditch made to Fairfield against the drivers were in the nature of complaints a customer would raise over unsatisfactory performance. [Pet. App. A-15]. Regarding pay, insurance and records, the ALJ determined that it was Fairfield who was responsible for pay and maintaining the drivers'

records. The record contained no evidence that Clinton's Ditch provided insurance for the drivers. Indeed, the Court determined that the isolated benefits Clinton's Ditch did provide to the drivers were so de minimis in nature as to be insignificant in a joint employer analysis. [Pet. App. A-15 to 16]. The alleged instances of supervisory involvement by Clinton's Ditch upon which the ALJ rested his finding were Clinton's Ditch accepting some collect phone calls from the drivers and occasionally assigning some runs. Examining the record as a whole, the Court found that Respondent's limited direct contact with the drivers did not support the day-to-day supervision found by the ALJ. [Pet. App. A-16 to 17].

The Court of Appeals also held that the lack of record evidence indicating Clinton's Ditch involvement in the

collective bargaining process between Fairfield and the Union also warranted a finding that Respondent was not a joint employer. The Court's determination was based on several pertinent facts established by the record. One, Clinton's Ditch neither participated in the 1978 bargaining negotiations between Fairfield and the Union, nor was it a party to the agreement signed between the two parties. Two, the Court determined that the ALJ's finding that Fairfield "continually had to consult with Clinton's Ditch" during the bargaining process was not indicative of Respondent's involvement as an employer, but merely demonstrated that Fairfield was informing a customer of possible rate increases due to increased labor costs. In addition, the Court noted that the record established only that the Fairfield representative had stated to the Union that he had to consult with

Clinton's Ditch before making any bargaining concessions. There was no evidence on the record to indicate whether the representative had actually consulted with Respondent or was merely using this statement as a bargaining ploy with the Union. Three, the Court noted that the NLRB had greatly relied on Clinton's Ditch influence on Fairfield during negotiations to insert a clause in the contract insuring that Fairfield's drivers would not honor a picket line by Respondent's production employees. As the Court aptly noted, however, the clause that was ultimately put into the contract as a result of this alleged pressure on Fairfield recognized "the complete separation of Clinton's Ditch and Fairfield Transportation" in resolving disputes. The resulting clause is hardly a statement upon which to base a conclusion that

Respondent was a joint employer of the drivers. [Pet. App. A-17 to 18].

This Court has long-recognized that a Court of Appeals must assess the totality the record evidence in determining whether "substantial evidence" supports the Board's findings and conclusions. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487-488 (1951). In Universal Camera, this Court held that a reviewing Court may set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's views." 340 U.S. at 488.

The Court of Appeals in the instant case applied the guidelines enunciated by Universal Camera in determining that substantial evidence did

not support the Board's finding Clinton's Ditch to be a joint employer. There is no compelling reason for this Court to review that determination.

III.

PETITIONER'S ARGUMENT THAT RESPONDENT VIOLATED SECTION 8(d) OF THE ACT BY REFUSING TO GIVE EFFECT TO AN ALLEGED ORAL AGREEMENT BETWEEN THE TWO PARTIES IS NOT PROPERLY BEFORE THIS COURT.

Petitioner argues that the Court of Appeals departed from established precedent and clear statutory language in failing to hold that an alleged oral promise by Clinton's Ditch to rehire Union drivers in the event Fairfield terminated its operations was enforceable under Section 8(d) of the Act. 29 U.S.C. §158(d). That issue is not properly before this Court.

Both the ALJ and the Board held that there had been no contract between

the parties regarding Clinton's Ditch rehiring the drivers in the event Fairfield went out of business, deciding this purely factual issue against the Petitioner. The ALJ stated:

> There was no contract between Clinton's Ditch and Local 317 because there was no meeting of the minds between the parties that Clinton's Ditch would rehire the drivers as their direct employees if Fairfield went out of business. (Pet. App. A-61).

The Board adopted this conclusion. (Pet. App. A-22).

As a successful charging party on the other allegations against Clinton's Ditch, Respondent intervened in the proceedings before the Court of Appeals. See, United Automobile Workers v. Scofield, 382 U.S. 205 (1965). Since Petitioner was an "aggrieved party" to the Board's determination that there was no Section 8(d) violation, however, Respondent was required to petition the Second

Circuit for review of this determination. Petitioner did not do so. Accordingly, the Board's motion to strike that part of Petitioner's brief challenging the Board's finding that Clinton's Ditch did not violate Section 8(d) of the Act was granted by the Court of Appeals prior to oral argument.

Since the question of whether Respondent violated Section 8(d) of the Act was not before the Court of Appeals, that issue cannot be raised before this Court as the basis for a writ of certiorari. See, Ellis v. Dixon, 349 U.S. 458 (1955), rehearing denied, 350 U.S. 855 (1955). Furthermore, the threshold issue presented is a purely factual one of whether an agreement was reached. Both the ALJ and the Board held against Petitioner on this issue. The resolution of this issue, which Petitioner did not

appeal from the Court below, does not merit the granting of certiorari.

## CONCLUSION

For the foregoing reasons, the Union's petition for a writ of certiorari should be denied.

Dated: June 22, 1986

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1743

In The

# Supreme Court of the United States

October Term, 1985

TEAMSTERS LOCAL 317,

*Petitioner,*

-against-

CLINTON'S DITCH COOPERATIVE CO., INC. and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# APPENDIX TO REPLY BRIEF

Page

Notice of Motion to Court of Appeals by National Labor Relations Board to Strike Part of Local 317's Brief ..... RA-1

Motion to Court of Appeals by National Labor Relations Board to Strike Part of Local 317's Brief ..... RA-5

Local 317's Affidavit in Opposition to National Labor Relations Board's Motion to Strike Part of the Intervenor's Brief ..... RA-9

Local 317's Motion to Court of Appeals for Permission to Transcribe a Part of the June 17, 1985 Oral Argument Presented Before the Second Circuit ..... RA-12

# TABLE OF AUTHORITIES

Page(s)

CASES:

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 4

*Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237 (7th Cir. 1982) ..... 6

*Mine Workers Dist. 17 v. Allied Corp.*, 765 F.2d 412 (4th Cir.), *cert. denied*, 105 S. Ct. 3527 (1985) ..... 5

*NLRB v. General Electric Co.*, 358 F.2d 292 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) ..... 2

*Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1459 (11th Cir. 1983) ..... 5

*Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981) ..... 5

*Smith v. Kerrville Bus Co.*, 709 F.2d 914 (5th Cir. 1983) ..... 6

*Vaca v. Sipes*, 386 U.S. 171 (1967) ..... 7

STATUTES AND RULES:

Fed. R. App. P. 27(c) ..... 2

National Labor Relations Act

29 U.S.C. § 141 *et seq.* ..... passim

29 U.S.C. § 158(d) ..... 1

Sup. Ct. R. 21 ..... 4

In its Petition, Local 317 contended that the Court of Appeals ran afoul of important federal labor law policy and statutory strictures in concluding that the Union had waived the right to enforce a commitment by Clinton's Ditch to rehire the Local 317 drivers and continue their employment under Local 317 contract if Clinton's Ditch's arrangement with its contract trucker, Fairfield, terminated (Petition at 16-19).

Respondent Clinton's Ditch argued in response that: (1) the issue was not properly before this Court because it had been stricken from the Union's brief to the Court of Appeals, and (2) the issue of an enforceable agreement to rehire the drivers was a factual one that should not be reviewed by the Court (Respondent's Brief in Opposition at 5 and 25-28).

The National Labor Relations Board argued in response to the Petition that the issue of an enforceable agreement to rehire the Local 317 drivers was not "directly" decided by the Court of Appeals (Memorandum at 3 n.4).

Each of these arguments is without merit.

## I.

In its brief to the Second Circuit, the Union argued that the Board erred in failing to find a violation of Section 8(d) of the Act by Clinton's Ditch's abrogation of its 1975 commitment to the Union to continue the employment of the drivers, either directly or through another contract trucker, if the Fairfield arrangement ceased. Shortly before the scheduled June 17, 1984 oral argument of this case before the Court of Appeals, the NLRB on

June 10, 1985 filed a motion for an order striking that argument from the Union's brief to the Court of Appeals.[1] This motion was made notwithstanding the fact that decisional law in the Second Circuit expressly holds that, as an intervenor, the Union was entitled to "raise all relevant issues upon review" and would not be entitled to file its own petition for review. *NLRB v. General Electric Co.*, 358 F.2d 292, 294 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). The Union filed an affidavit in opposition to the motion to strike (RA-10), pointing this precedent out to the Court of Appeals. However, on June 13, 1985, presumably without having seen the Union's opposition papers, a single judge of the Court of Appeals, pursuant to F.R.A.P. Rule 27(c), granted the motion (RA-3). That order was filed June 13, 1985, the Thursday before the oral argument scheduled to be held on Monday, June 17, 1985.

Rule 27(c) of the Federal Rules of Appellate Procedure provides that the action of a single judge on such a motion "may be reviewed by the Court." At oral argument on June 17, 1985, the Union pointed out to the Court that there was Second Circuit precedent that upheld the right of the Union as intervenor to raise the argument in question, and that the Union was requesting the panel to reverse the action of the single judge in granting the motion to strike.

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[1]The Board's motion to strike is reproduced in the Appendix to this Reply Brief. RA-1 to RA-8. There will also be references in this Reply Brief to the Appendix to the Petition, designated as "A—".

At oral argument, the Court of Appeals indicated that it understood this application for review.[2] And, in its decision, the Court of Appeals expressly addressed on the merits the Union's argument that the Board erred in failing to find an enforceable agreement by Clinton's Ditch to rehire the drivers. The Court of Appeals stated:

> We recognize that when Fairfield first undertook the subcontract, Clinton's Ditch apparently informed the drivers that if the new arrangement did not work out, the truck drivers would continue to be Clinton's Ditch employees. (A-19).

But, the Court of Appeals ruled as a matter of law that the Union had waived its right to bind Clinton's Ditch to the commitment:

> Had the Union intended to bind Clinton's Ditch to its earlier oral assurance, or formally to extend the employer - employee relationship between Clinton's Ditch and the drivers, it should have tried to bring Clinton's Ditch to the bargaining table in 1978. . . . The earlier assurance, even coupled with the Union's refusal to release Clinton's Ditch from the 1975-78 bargaining agreement, lost its effect when the Union began dealing directly with Fairfield. (A-61).

Thus, the Court of Appeals expressly decided the merits of the Union's contention that Clinton's Ditch had violated the National Labor Relations Act by failing to honor its commitment to the Union to continue the driv-

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[2]The Court of Appeals has granted Local 317's motion (RA-14) for an Order allowing transcription of that part of oral argument at which the Union requested that the panel review the action of the single judge in striking the argument. The transcript will be included in a Supplemental Brief to the Court when it becomes available.

ers as employees of Clinton's Ditch. Although the Second Circuit did not expressly state that it was "reviewing" the action of the single judge in granting the motion to strike, a fair reading of its treatment of this issue is that it considered the argument on the merits and perforce reversed the earlier order striking the argument.

Accordingly, Clinton's Ditch's contention that the question of whether it violated the Act by failing to rehire the drivers pursuant to its oral agreement to do so was not before the Court of Appeals (Brief in Opposition at 26-27) is erroneous. Moreover, even if the question had not been presented to the Court of Appeals, it clearly was addressed by the court and is therefore subject to review by this Court.[3]

The issue of the enforceability of the oral agreement was "fairly included" in question presented No. 2 of the Petition, dealing with the Court of Appeals' conclusion that the Union had waived its rights. See Supreme Court Rule 21.[4]

II.

Both the Board (A-35, A-61) and the Court of Appeals (A-6, A-19) concluded as a factual matter that Clinton's Ditch had made a commitment to rehire the Local

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[3]*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 146 n.2 (1970) ("where issues are neither raised before *nor considered* by the Court of Appeals, this Court will not ordinarily consider them." [emphasis supplied]).

[4]The second question presented by Petitioner was "Whether the Court of Appeals erred in finding a waiver of the right to bargain" by the Union. The waiver found was in the Union's right to enforce Clinton's Ditch's bargaining obligation by holding it to its commitment to rehire the drivers under Local 317's contract (A-19).

317 drivers if the arrangement with Fairfield was terminated. However, the Administrative Law Judge, affirmed by the Board, had concluded that notwithstanding the evidence, there was "no meeting of the minds" between the parties that Clinton's Ditch would rehire the drivers if Fairfield went out of business and thus, there was no enforceable contract to do so. And, as indicated above, the Court of Appeals, while recognizing that a commitment had been made, found that the Union had waived the right to enforce Clinton's Ditch's commitment to rehire the drivers.

Thus, in both cases, there was no factual question decided against the Union as to whether a commitment had been made. Rather, a legal issue was decided as to the enforceability under the National Labor Relations Act of that commitment. The Board's and the Court of Appeals' refusals to enforce the commitment conflict with decisional law eschewing such a technical approach to determining enforceable agreements under the federal labor law.

It has been recognized that technical contract notions such as "meeting of the minds" do not govern determinations of whether an enforceable labor contract exists.[5]

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[5]See, e.g., *Mine Workers Dist. 17 v. Allied Corp.*, 765 F.2d 412, 418 (4th Cir.), *cert. denied*, 105 S.Ct. 3527 (1985); *Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1460 (11th Cir. 1983) ("federal courts have liberally applied contract law in determining whether an enforceable labor agreement exists."); *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981) ("it is well-established that technical rules of contract do not control whether a collective bargaining agreement has been reached", and "the common law rule that a rejection or counterproposal necessarily terminates the offer has little relevance in the col-

(Continued on following page)

Rather, an enforceable contract existed in Clinton's Ditch's promise to rehire the drivers and continue their employment under Local 317's contract, and Local 317's acceptance of that promise as inferred from its conduct following the making of the promise.[6]

In the instant case, Local 317 acted on Clinton's Ditch's commitment to rehire the drivers by refusing to release Clinton's Ditch from its obligations (A-36) and by dealing with Fairfield for a labor agreement on the premise that Clinton's Ditch had retained control of the terms of any labor agreement between the Union and Fairfield (A-35, A-46). There is nothing to indicate that there was any limitation in time to Clinton's Ditch's commitment to rehire the drivers if Fairfield terminated, and thus there is no reason to restrict that commitment, as the Court of Appeals did (Petition at A-19), to the time ending when the Union "began dealing directly with Fairfield." (A-61).[7] Enforcing Clinton's Ditch's commitment would effec-

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(Continued from previous page)

lective bargaining setting." *Id.* at 89). *See also Smith v. Kerrville Bus Co.*, 709 F.2d 914, 920 (5th Cir. 1983), where the court noted that "[i]t is well established that § 301 [29 U.S.C. § 185] must be broadly construed to encompass any agreement, written or unwritten, formal or informal, which functions to preserve harmonious relations between labor and management."

[6]*Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237 (7th Cir. 1982). The court noted that "[a]ll that is required is conduct manifesting an intention to abide and be bound by the terms of an agreement." *Id.* at 243. In that case, although the union did not expressly accept the employer's offer to be bound by whatever contract was reached by the union with the employer's competitors, the union's actions thereafter constituted "acceptance" of the offer and the employer was held bound to honor its commitment.

[7]*See Id.* at 245, where the court noted that there was no type of contract duration condition attached to the offer.

tuate the federal policy of maintaining and promoting "industrial peace."[8]

III.

As the discussion of the Court of Appeals' opinion on this question illustrates, see pages 2-3, *supra*, the Board's contention that the issue of the commitment to rehire the drivers was "not directly decided" (Memorandum at 3 n.4) also is erroneous. Contrary to the Board, the Court of Appeals' discussion of the impact of the Union's failure to insist that Clinton's Ditch sign the collective bargaining agreement with Fairfield was addressed directly to the issue of whether the Union was in a position to enforce the earlier oral commitment to rehire the drivers. It was hardly "addressed largely to whether Clinton and Fairfield were joint employers" as the Board would claim (Memorandum at 3 n.4).

The Petition for Certiorari raises an important question concerning the enforceability of commitments between employers and unions that serve to stabilize bargaining relationships and preserve industrial peace. The Court of Appeals' refusal to enforce such a commitment here violates this Court's express mandate that a union waiver

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[8]*See Vaca v. Sipes*, 386 U.S. 171, 182 (1967). As the court stated in *Capitol-Hustings, supra* note 6, at 245, "[t]here may be no greater danger to stable and productive union-management relations than reneging on a contract."

of rights can only be found in clear and unmistakable conduct. The Union asks that the Petition be granted.

Respectfully submitted,

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Dated: July 23, 1986

# APPENDIX TO REPLY BRIEF

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Second Circuit Rule 27(a) governing use of this form is reprinted on reverse of Page 2. Note requirement that supporting affidavits be attached.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 85-4043(L); 85-4051

Clinton's Ditch Cooperative Co., Inc.,

Petitioner-Cross-Respondent,

v.

National Labor Relations Board,

Respondent-Cross-Petitioner.

NOTICE OF MOTION

(Filed June 10, 1985)

state type of motion
for to strike part of the brief of the Intervenor

MOTION BY: (*Name and tel. no. of law firm and of attorney in charge of case*)

National Labor Relations Board
1717 Penn. Ave., N.W.
Washington, D.C. 20570
Mark S. McCarty 202-254-6216

OPPOSING COUNSEL: (*Name and tel. no. of law firm and of attorney in charge of case*)

Blitman and King
500 South Salina St.
Syracuse, N.Y. 13202
James R. LaVaute 315-422-7111

Has consent of opposing counsel:

A. Been sought? ☐Yes XNo

B. Been obtained? ☐Yes XNo

*Notice of Motion to Strike Part of Local 317's Brief*

Has service been effected? XYes ☐No

Is oral argument desired? ☐Yes XNo
(*Substantive motions only*)

Requested return date:
(*See Second Circuit Rule 27(b)*)

Has argument date of appeal been set:

A. by scheduling order? ☐Yes ☐No

B. by firm date of argument notice? XYes ☐No

C. If Yes, enter date: June 17, 1985

Judge or agency whose order is being appealed:

National Labor Relations Board

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐Yes ☐No
(*See F.R.A.P. Rule 8*)

Would expedited appeal eliminate need for this motion? ☐Yes ☐No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐Yes ☐No

Brief statement of the relief requested:

An order striking part of the Intervenor's brief.

Complete Page 2 of This Form

By: (*Signature of attorney*)

Signed name must be printed beneath

/s/ Mark S. McCarty

*Notice of Motion to Strike Part of Local 317's Brief*

Appearing for: (*Name of party*)

National Labor Relations Board

Date June 6, 1985

Appellant or Petitioner:

☐Plaintiff ☐Defendant

Appellee or Respondent:

☐Plaintiff ☐Defendant

—ORDER—

*Kindly leave this space blank*

IT IS HEREBY ORDERED that the motion be and it hereby is granted June 13, 1985.

/s/ George C. Pratt

PAGE 2

Previous requests for similar relief and disposition: none

Statement of the issue(s) presented by this motion:

Whether part of the Respondent-Intervenor's brief should be stricken since it challenges part of the Board's findings in this case and the Intervenor has not filed a petition to review the Board's findings.

Brief statement of the facts (*with page references to the moving papers*):

On pages 44 and 45 of its brief, the Respondent-Intervenor challenges the Board's finding that Clinton's Ditch did not violate Section 8(d) of the Act. The Intervenor has not filed a petition to review that, or any other section, of the Board's findings and order in this case. This Court, on April 3, 1985, granted the Union's motion to intervene on the basis that it was the successful and charging party

in the underlying proceedings before the Board and not on the basis that it was a person aggrieved by the Board's order. Here, the Intervenor has not filed a petition to review any part of the Board's order, its motion to intervene was granted on the basis that it was a successful party before the Board, and accordingly, its challenge to part of the Board's findings is improperly raised before the Court.

Summary of the argument (*with page references to the moving papers*):

A successful, charging party is "granted leave to intervene with regard to the portion of the order on which the Board found in [its] favor." *United Automobile Workers v. Scofield,* 382 U.S. 205, 210 (1965). However, as to that portion of a Board order dismissing part of the General Counsel's complaint, the charging party is a "person aggrieved" under the Act, and as such, pursuant to Section 10(f) of the Act (29 USC 160(f)), has a statutory right to seek review in an appropriate court of appeals by filing a petition to review that portion of the Board's order. See *United Automobile Workers v. Scofield,* 382 U.S. 205, 210 (1965).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 85-4043 (L)
85-4051

CLINTON'S DITCH COOPERATIVE CO., INC.,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner,

and

TEAMSTERS LOCAL 317, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

## MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO STRIKE PART OF THE INTERVENOR'S BRIEF

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully requests this Court to strike a portion of the brief of the Intervenor. In support of its motion, the Board shows:

1. The United Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, Local Union No. 317 ("the Union") was the charging party before the National Labor Relations Board ("the Board") in the underlying proceedings in this case.

*Motion to Strike Part of Local 317's Brief*

2. On February 28, 1985, the Board issued a Decision and Order finding that the charged party, Clinton's Ditch Cooperative Co., Inc. ("Clinton's Ditch") had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*).

3. On March 13, 1985, Clinton's Ditch, as a person aggrieved by this final order of the Board, pursuant to Section 10(e) and 10(f) of the Act (29 U.S.C. 160(e) and (f)), filed with this Court a petition to review and set aside the Board's order.

4. By motion dated March 27, 1985, the Union requested that the Court grant it leave to intervene in this case on the basis that it was the charging party and the successful party before the Board.

5. On April 3, 1985, this Court granted the Union's motion to intervene.

6. On April 16, 1985, the Board filed its cross-application for enforcement of its order against Clinton's Ditch pursuant to Section 10(e) and 10(f) of the Act (29 U.S.C. 160(e) and (f)).

7. The Union, as an intervenor, filed a brief with this Court dated May 17, 1985. On pages 44 to 45 of this brief, the Union argues that the Board erred by failing to find that Clinton's Ditch violated Section 8(d) of the Act (29 U.S.C. 158(d)) by unilaterally changing the terms and conditions of the drivers' employment during the existence of a collective bargaining agreement and by reneging on its commitment to the Union to retain the drivers if its arrangement with Fairfield Transportation Corp. terminated.

*Motion to Strike Part of Local 317's Brief*

8. The Union's attack on the Board's decision that Clinton's Ditch did not violate Section 8(d) of the Act is an improper subject to be raised in its brief as an intervenor. The Union's request to intervene in this case was based on its status as the "successful" charging party in the underlying proceedings before the Board. As such, this Court, as well as other courts of appeal, have "invariably . . . granted leave to intervene *with regard to the portion of the order on which the Board found in* [*it*]*s favor.*" *United Automobile Workers v. Scofield*, 382 U.S. 205, 210 (1965) (emphasis added). However, as to that portion of a Board order dismissing part of the General Counsel's complaint, the charging party is a "person aggrieved" under the Act, and as such, pursuant to Section 10(f) of the Act (29 U.S.C. 160(f)), had a statutory right to seek review in an appropriate Court of Appeals by filing a petition to review that portion of the Board's order. See *United Automobile Workers v. Scofield*, 382 U.S. 205, 210 (1965).

9. In sum, it is inappropriate for the Union to raise this issue as a respondent-intervenor, in the case against Clinton's Ditch. It is also inappropriate at this point in the proceeding for the Union to raise an issue that should have been raised by filing a petition for review and putting the Board on notice as to this objection.

WHEREFORE, the Board respectfully requests that the Court grant its motion and strike those sections of pages 44 and 45 of the Intervenor's brief which challenge the Board's decision that Clinton's Ditch did not violate Section 8(d) of the Act (29 U.S.C. 158(d)).

*Motion to Strike Part of Local 317's Brief*

/s/ Elliott Moore (by MJM)
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS
BOARD

Dated: Washington, D. C.
June 6, 1985

*Local 317's Affidavit in Opposition to Motion to Srike Part of Intervenor's Brief*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NOS. 85-4043 (L) & 85-4051
CLINTONS DITCH COOPERATIVE INC V NLRB

AFFIDAVIT IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE PART OF THE BRIEF OF THE INTERVENOR

STATE OF NEW YORK )
) ss.:
COUNTY OF ONONDAGA )

JAMES R. LA VAUTE, being duly sworn, deposes and says:

1. I am a member of the law firm of Blitman and King, attorneys for Teamsters Local No. 317 (hereinafter "Teamsters 317"), Intervenor in the above-referenced matter. I am fully familiar with the facts set forth in this Affidavit in Opposition of Respondent's Motion to Strike Part of the Brief of the Intervenor.

2. Teamsters 317 was the successful Charging Party before the National Labor Relations Board (hereinafter "the Board") in the underlying proceeding.

3. On February 28, 1985, the Board issued a Decision and Order finding that the Charged Party, Clinton's Ditch Cooperative Co., Inc. (hereinafter "Clinton's Ditch") had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*).

4. On March 13, 1985, Clinton's Ditch filed a Petition to review and set aside the Board's Order with this Court.

*Local 317's Affidavit in Opposition to Motion to Srike Part of Intervenor's Brief*

5. On April 3, 1985, this Court granted Teamsters 317's motion to intervene in this proceeding.

6. On May 17, 1985, Teamsters 317, as an intervenor, filed a Brief with this Court arguing all relevant issues, including not only arguments supporting the Board's decision and order but also arguing that the Board erred in failing to find that Clinton's Ditch violated Section 8(d) of the Act (29 U.S.C. 158(d) by unilaterally terminating the drivers' employment.

7. On June 8, 1985, Intervenor was served with a motion to strike part of its Brief brought by the Respondent Board. Said motion is based upon the Board's contention that a successful Charging Party may not address issues outside that portion of the Order on which the Board found in its favor.

8. However, this Court has refused to limit the scope of an intervenor's argument and permits an intervenor to "raise all relevant issues upon review . . . ." *NLRB v. General Electric Co.*, 358 F. 2d 292, 61 LRRM 2609 (2nd Cir.), *cert, denied,* — U.S. —, 63 LRRM 2282 (1966). Thus, this court in *General Electric* dismissed the Union's petition to review on the ground that the Union would be "permitted as intervenor to raise all relevant issues upon review. . . ." *Id.* at —, 61 LRRM at 6210. It is noted that *General Electric* was decided after *Automobile Workers v. Scofield,* 382 U.S. 205 (1965), relied on by the Board in its motion to strike.

9. In sum, Intervenor has properly raised and addressed all relevant issues in its Brief to this Court, in-

cluding the issue raised on pages 44 and 45 of the Brief with respect to the Board's failure to find a violation of Section 8(d) of the Act.

WHEREFORE, Intervenor respectfully requests that the Court deny Respondent's motion to strike certain sections of pages 44 and 45 of Intervenor's Brief which challenge the Board's Decision insofar as the Board failed to find a Section 8(d) violation.

/s/ James R. La Vaute

*Local 317's Motion for Permission to Transcribe a Part of Oral Argument*

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Second Circuit Rule 27(a) governing use of this form is reprinted on reverse of Page 2. Note requirement that supporting affidavits be attached.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 85-4043(L); 85-4051

CLINTON'S DITCH COOPERATIVE CO., INC.,

Petitioner-Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

NOTICE OF MOTION

(Filed June 11, 1986)

state type of motion
To Transcribe Oral Argument

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of case)

BLITMAN AND KING, James R. LaVaute,
The 500 Building, Suite 1100
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 422-7111

*Local 317's Motion for Permission to Transcribe a Part of Oral Argument*

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

NATIONAL LABOR RELATIONS BOARD
Mark S. McCarty, Esq.
Telephone: (315) 254-9062

Petitioner-Cross-Respondent:

CLIFTON, BUDD, BURKE & DE MARIA,
Thomas W. Budd, Esq. (212) 687-7410

Has consent of opposing counsel:

| | | |
|---|---|---|
| A. been sought? | X Yes | ☐ No |
| B. been obtained? McCarty, yes; Budd, no | ☐ Yes | ☐ No |
| Has service been effected | X Yes | ☐ No |
| Is oral argument desired? (*Substantive motions only*) | ☐ Yes | ☐ No |

Requested return date:
(*See Second Circuit Rule 27(b)*)

Has argument date of appeal been set:

| | | |
|---|---|---|
| A. by scheduling order? | ☐ Yes | ☐ No |
| B. by firm date of argument notice? | X Yes | ☐ No |

C. If yes, enter date: Argument held June 17, 1985

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

| | | |
|---|---|---|
| Has request for relief been made below? (*See F.R.A.P. Rule 8*) | ☐ Yes | ☐ No |
| Would expedited appeal eliminate need for this motion? | ☐ Yes | ☐ No |

*Local 317's Motion for Permission to Transcribe a Part of Oral Argument*

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

NATIONAL LABOR RELATIONS BOARD

Brief statement of the relief requested: An Order granting permission for Intervenor Teamsters Local 317 to transcribe the text of the June 17, 1985 oral argument by Intervenor's Counsel James R. LaVaute, Esq., or alternatively, the entire oral argument of that date, for use as Appendix to Brief to United States Supreme Court in the same proceeding.

Complete Page 2 of This Form

By: (*Signature of attorney*)

/s/ James R. LaVaute
Signed name must be printed beneath

JAMES R. LA VAUTE, ESQ.

Appearing for: (*Name of party*)
TEAMSTERS LOCAL 317

Date
July 10, 1986

Appellant or Petitioner:

☐ Plaintiff ☐ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

*Kindly leave this space blank*

IT IS HEREBY ORDERED that the motion be and it hereby is granted July 14, 1986

/s/ Vincent Flanagan
Chief Deputy Clerk

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1743

In The

# Supreme Court of the United States

October Term, 1985

TEAMSTERS LOCAL 317,

*Petitioner,*

-against-

CLINTON'S DITCH COOPERATIVE CO., INC. and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BLITMAN AND KING

*Attorneys for Petitioner*
Office and Post Office Address
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500 South Salina Street
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Of Counsel:

James R. LaVaute*
Donald D. Oliver

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

In its Petition, Teamsters Local 317 contended that the Court of Appeals ran afoul of important federal labor law policy and statutory strictures in concluding that the Union had waived the right to enforce a commitment by Clinton's Ditch to rehire the Local 317 drivers and continue their employment under Local 317 contract if Clinton's Ditch's arrangement with its contract trucker, Fairfield, terminated (Petition at 16-19).

In response, Clinton's Ditch contended that the issue was not properly before this Court because it had been stricken from the Union's brief to the Court of Appeals (Respondent's Brief in Opposition at 5 and 26-27).

In its Reply Brief, Local 317 pointed out that, pursuant to F.R.A.P. Rule 27(c), it had requested the Second Circuit at oral argument to reverse the action of the single judge granting the motion to strike (Reply Brief at 2). Local 317 noted that the Second Circuit had since granted Local 317's motion to transcribe that part of the oral argument (Reply Brief at 3 n.2).

The oral argument referred to above has now been transcribed and released by the Second Circuit. The transcript shows the following exchanges between Local 317's counsel and the court during the oral argument held at the Second Circuit on June 17, 1985:

> MR. LaVAUTE: Clinton's Ditch claims that the union waived its rights here and there were a number of events in the course of this history between this group of drivers and Clinton's Ditch through Fairfield that I would like to point out to the court.
>
> In each case the union reiterated its rights, would not relinquish its rights and repeated that it was not going to release Clinton's Ditch from its obligation as

the employer of these drivers, the same drivers that it had employed in the past.

In 1975, Clinton's Ditch says to the union, "We want to bring in Fairfield to supervise the trucks, basically, to handle the maintenance of the trucks." They tell the union there will be no changes. Everything will be the same. Tell the drivers at the same time, "You will always have a job with us." [Transcript of portion of oral argument, page 3.]

. . . .

Now, Judge Pratt, one more thing if I may.

The union took issue with the board here and said, since Clinton's Ditch is the joint employer, in effect, standing in the shoes of Fairfield, we argued there should have been a violation of Section 8(d) by Clinton's Ditch with respect to, in effect, terminating the collective bargaining agreement without giving the notice provision—the notice requirements under the National Labor Relations Act and also by repudiating the agreement reached with the union in 1975 as to protecting these drivers in the event Fairfield left the scene and the board did not find an 8(d) violation.

The board did not find an 8(d) violation and, Judge Pratt, you signed an order granting the board's motion to strike those portions of our brief where we argued that.

THE COURT: You did not petition to have the board's action reviewed?

MR. LaVAUTE: Well, no, we did not, but there is a Second Circuit case, the General Electric case, which is cited in our brief in this case in which this court held that a union is not entitled in this situation to cross-petition and that if it intervenes, it is entitled to raise whatever issues it wanted to raise as part of the case.

So I would request that the court reconsider that ruling.

One of the aspects of it that may make a difference is that if the court finds—

THE COURT: My colleagues have the power to overrule me on that and I assume you are requesting them to do so?

MR. LaVAUTE: I am requesting pursuant to the Federal Rules of Appellate Procedure that they reconsider that question.

THE COURT: That is quite proper.

[Transcript of portion of oral argument, pages 7-8.]

. . . .

Thus, the transcript of the oral argument shows that Local 317 preserved, in the Second Circuit, the question of whether Clinton's Ditch violated its commitment to rehire the Local 317 drivers. And, as pointed out in Local 317's Reply Brief, the Second Circuit expressly addressed the issue in its decision (Reply Brief at 3). That issue is properly before this Court.

Respectfully submitted,

JAMES R. LAVAUTE
DONALD D. OLIVER

BLITMAN AND KING
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The 500 Building, Suite 1100
500 South Salina Street
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(315) 422-7111

Dated: September 24, 1986